Office - Supreme Court, U. S.
FILED
APR 14 1950
CHARLES ELMORE CROPLEY

# Supreme Court of the United States

OCTOBER TERM, 1949

## No. 752

FLOYD W. DUNAWAY, ALLIE MERLE DUNAWAY, joined by her husband, FLOYD W. DUNAWAY, MATTIE V. DUNAWAY, a feme sole, JOHNNIE FAY DUNAWAY SMITH, joined by her husband, CLARENCE R. SMITH, JULIA DUNAWAY IRICK, joined by her husband, J. T. IRICK, NELLIE DUNAWAY GROGAN, joined by her husband, GEORGE B. GROGAN, MAMIE DUNAWAY CUNDIFF, joined by her husband, E. J. CUNDIFF, MARY FRANCES DUNAWAY IRWIN joined by her husband, EARL R. IRWIN, RUBY DUNAWAY WRIGHT, a feme sole, PETITIONERS,

versus

STANDARD OIL COMPANY (New Jersey), CITIES SERVICE COMPANY, NATURAL GAS PIPELINE COMPANY OF AMERICA, COLORADO INTERSTATE GAS COMPANY, SOUTHWESTERN DEVELOPMENT COMPANY, RESPONDENTS.

## ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES AND BRIEF IN SUPPORT THEREOF.

ARTHUR H. BARTHLT,
Attorney for Petitioners,
P. O. Box 190,
Austin, Texas.

RECORD PRINTING CO., SAN ANTONIO, TEXAS

## SUBJECT INDEX OF PETITION AND BRIEF

### PETITION


Page

I.

Opinion Appealed From ..... 2

II.

Statement as to Jurisdiction of the Court ..... 2

III.

Nature of the Petition ..... 6

IV.

Constitution, Statutes and Rules of Procedure Involved ..... 6

V.

Summary Statement of Matter Involved ..... 6-15

1. General Subject of Litigation ..... 7
2. Facts Involved in the Appeal ..... 8
3. The Conspiracy and Its Memorandum of Stipulations ..... 10
4. Original Contribution of Each Member of the Tripartite ..... 11
5. Facts in the Briefs of the Government's Attorneys in the Case of Colorado Interstate Gas Company vs. Federal Power Commission, 142 F. 2d, 943, and in the Same Case in the Supreme Court of the United States, 324 U.S. 581, 89 L. ed., 807-902 ..... 12
   (a) "Brief in Circuit Court of Appeals" ..... 12
   (b) "Brief of Government Attorneys in the Supreme Court of the United States" ..... 15

VI.

Questions Presented and Reasons Relied on for the Allowance of the Writ ..... 17

I.

BRIEF

Page

Opinion of the Court Below ..... 34

II.

Jurisdiction ..... 34

III.

Nature of the Appeal ..... 35

IV.

Specifications of Errors ..... 35

1. Plaintiffs Deprived of Constitutional Right to be Heard ..... 35
2. Controlling Issue Sidetracked for Issue Not in Case ..... 35
3. Held District Court's Order Not Interlocutory ..... 35
4. Refused to Give Cognizance to Plaintiff's 178 Page Complaint and the Universally Accepted Principle of Law "for the Purpose of the Motion, All Well Pleaded Facts Are True" ..... 36
5. Affirmed Erroneous Statement of District Court ..... 36
6. Held that Allegations of Appellees' Affidavits Could be Met Only by "Controverting Affidavits or Other Proof" ..... 36
7. Sanctioned Contention of Appellees that Motion to Quash Not Governed by Rule 12(b) ..... 36
8. Overruled Plaintiffs' Contention that Standard and Cities Service being Foreign Corporations, Order Final Judgment instead of Interlocutory ..... 36
9. Overruled Plaintiffs' Contention that Other Four Alleged Appellees Not Corporate Entities ..... 37

Page

10. Approved Appellees' Contention that Exhibits Have No Probative Value, Conflicting with Rule 10(c) which Says "Exhibit to a Pleading Is a Part thereof for All Purposes" ..... 37

11. Approved Appellees Assuming that Canadian, Colorado, Natural and Southwestern Are Corporate Entities, with No Other Proof than Conclusions Contained in Affidavits of Their Officials ..... 37

12. Held All Appellees Jointly instead of Jointly and Severally Liable ..... 37

13. Circuit Judge Waller Based His Opinion that Defendants Jointly Liable on Hunteman Case after Stating "It Seems to Me to Be Incorrect to Say that the Dismissal Orders in This Respect Were Interlocutory" ..... 37

14. Affirmed District Court's Order Dismissing En Masse Every Interrogatory under Rule 33, Denying Discovery Rules to Plaintiffs ..... 38

15. Granted Defendants' Motion Dismissing Plaintiffs' Complaint Showing Unlawful Drainage of Natural Gas underneath Plaintiffs' Land and Conversion of Same to Own Use, Impressed with Constructive Trust in Favor of Plaintiffs ..... 39

16. Granted Defendants' Motion for Dismissal of Plaintiffs' Complaint when Title 15, Section 15 U.S.C.A. Fixes Venue "in Any District of United States in District in Which Defendant Resides or Is Found or Has an Agent" ..... 40

17. Sustained Cities Service's Contention that Plaintiffs' Complaint Was a Complete Nullity ..... 40

Page

18. Sustained Colorado's Statement that Exhibits Attached to Plaintiffs' Complaint Have No Probative Value ..... 40

19. Approved Standard's Statement "Motion to Dismiss Admits All Facts Well Pleaded" but Motion "to Quash Admits Nothing. It Was a Special Appearance." This Conflicts with Rule 12(b) ..... 43

20. Sustained Natural's Statement in Its Petition that Colorado and "Plaintiff (Natural) Are the Beneficial Owners of the Natural Gas Reserves in Place, the Legal Title to Which Is Vested in Canadian, and the Status of Canadian, in Fact, and in Equity, Is That of An Operating *Agent* or *Department* of Colorado, and a Trustee Holding the Legal Title to Said Reserves for the Benefit of Colorado and Plaintiff (Natural)" ..... 44, 45

21. Sustained Southwestern's Motion to Quash and Dismiss for the Same Foregoing Reasons ..... 47

V.

Summary Statement of Matter Involved ..... 48

VI.

Argument ..... 49-72

The District Court Deprived Plaintiffs of Their Constitutional Right under the Fifth Amendment of the United States Constitution to be Heard before Judgment Was Entered Against Them ..... 49

Defendants' Taking Natural Gas in Excess by Unlawful Drainage, as Shown in Plaintiffs' Brief, Impresses Such Excess with a Constructive Trust when It Enters Defendants' Pipelines and Tanks, with Plaintiffs as the Cestui and Defendants as Trustees ..... 52

The Liability Created by the Defendants in Themselves by said Continuing Tort Is Not Joint but Several and Joint ..... 53

Court of Appeals Said It Dismissed Plaintiffs' Action "Upon Our Case, Hunteman v. New Orleans Public Service, Inc., 119 F. (2) 465." Whose Controlling Fact Bears No Relation to That of the Case at Bar as Evidenced by Plaintiffs' Complaint..... 54

The Liability in Plaintiffs' Case Is Not Joint but Joint and Several ..... 56

A Corporation Can Be a Conspirator ..... 58

The Court of Appeals Said in Its Opinion "We Cannot Agree with Appellants. We Think It too Clear for Argument that the Authorities Appellees Cite Are Controlling Here. The Action Brought Is One Against Six Defendants for the Consequences of Their Joint and Concurrent Action"..... 59

The Court of Appeals Says "The Authorities Appelpellees Cite Are Controlling Here" and then Lists These Cases in the Footnote, Tr. R. 383, but All the Cases Cited Are to the Effect that Only If the Liability Involved Is Joint and Not Joint and Several May the Order or Judgment be Interlocutory.. 60

The Court of Appeals Says, Tr. R. 383, "The Orders Are Interlocutory and, therefore, Subject to be Set Aside or Modified at Any Time until the *Whole Cause Is Disposed of*," thus Erroneously Implying that if the Supreme Court Takes Jurisdiction and Renders a Judgment a *Part* of the *Cause* Has Been Disposed of..... 64

A Decision which Completely Determines a Collateral Matter Distinct from the General Subject of Litigation and Finally Settles that Controversy Is Appealable ..... 65

Memorandum of Stipulations Not Voidable but Void.....67

One Void Consideration Makes Entire Contract Void.....68

A Contract Growing Out of or Connected with a Prior Illegal Contract—The Illegality of the Latter Enters into the New Contract and Renders It Illegal .....68

Directors, Stockholders, and Even Courts Are Powerless to Breathe Life and Validity into a Void Contract .....69

The Rule that a Motion to Dismiss Concedes the Truth of All Well Pleaded Facts Has a Constitutional Basis .....71

Conclusion .....72

INDEX OF AUTHORITIES FOR PETITION AND BRIEF

---

A.

American Construction Co. v. Jacksonville, T. & K. W. Ry. Co., 148 U.S. 372, 383, 13 S. Ct. 758, 37 L. ed 486.....20

Atlanta v. Chattanooga Foundry & Pipeworks, 127 F. 23, 64 L.R.A. 721 .....56

B.

Buffalo Lubricating Co. v. Acme Oil Co., 106 N.Y. 669, 129 N.E. 825 .....58

Bruner et al v. Johnson, 35 F. 2d, 493.....21

Brauch v. Birmingham (D.C.) Iowa, 49 Supp. 229.....22

C.

Chicago, Burlington & Quincy R. R. Co. v. Willard, 220 U.S. 413, 31 S. Ct. 460, 55 L. ed. 521.....20

Clark v. Humble Oil & Ref. Co., 57 S.W. (2d) 597, 602. Reversed on other grounds, 87 S.W. (2d) 471....70

Colorado Interstate Gas Co. & Canadian River Gas Co. vs. Federal Power Commission, 142 F. 2d 943....9, 12

Colorado Interstate Gas Co. & Canadian River Gas Co. v. Federal Power Commission, 324 U.S. 581.....9, 12

Colorado Interstate Gas Co. vs. Federal Power Commission, 142 F. 2d, 943 .....48

Colorado Interstate Gas Co. vs. Fed. Power Com., Sup. Ct. U. S., 324 U.S. 581, 89 L. ed. 807, 902.....48

Concordia Ins. Co. of Milwaukee v. School District, 282 U.S. 545, 75 L. ed. .....21

D.

Dartmouth College Case, 17 U.S. 4 Wheat 518.....49

Du Pont de Nemours Powder Co. v. Masland, 244 U.S. 100, 102, 37 S. Ct. 575, 61 L. ed. 1016.....20

F.

Ferguson v. Mounts, 281 S.W. 616, 621 .....67, 70
Forsyth v. Hammond, 166 U.S. 506, 513, 515,
17 S. Ct. 458, 67 L. ed. 719 .....20
Forsyth v. Hammond, 166 U.S. 506, 515,
17 S. Ct. 665, 41 L. ed. 1095.....20

G.

Geismer v. Bond Goodwin, Inc., 49 Fed. Supp. 229.....22
Gibbs v. Consolidated Gas Co., 130 U.S. 396, 419,
32 L. ed. 979, 9 S. Ct. 553.....70

H.

Hanover Star Milling Co. v. Metcalf, 240 U.S. 403,
408, 409, 36 S. Ct. 357, 60 L. ed. 713.....20
Hamilton Brown Shoe Co. vs. Wolf Bros. & Co.,
240 U.S. 258, 259, 60 L. ed. 629.....23
Horbach v. Coyle, 2 F. (2) 707 (C.C.A. 8).....69
Hovey v. Elliott, 167 U.S. 418 .....49
Hunteman v. New Orleans Public Service Co., Inc.,
119 Fed. 2d, 465 .....3, 4, 30, 38
Hunteman v. New Orleans Public Service Co., Supra.....54

I.

International Harvester Co. vs. Ky., 234 U.S. 579.....47

K.

Kaffenberger v. Kremer, 4 Fed. Rules Dec. 478.....36
Kuhn et al v. Canteen Food Serv. Ice Co., Inc., et al,
9th Circuit, 150 F. 2d, 55 (1945) .....61

M.

Meyer v. Walker, 276 S.W. 305, 307 (Tex. Civ. App.).....70
Motley v. Detroit Steel, etc. Co., 161 Fed, 389.....30, 58

N.

Northwestern Oil Co., C.C.A. Wis., 138 F. (2)
Cer. denied, 321 U.S. 722 ..... 57
Northwestern Oil Co., C.C.A. Wis., 138 Fed. (2) 967,
Cer. denied, 321 U.S. 792 ..... 30

O.

Oldham v. Briley, 117 S.W. 2d. 797 ..... 69

P.

Photometric Products Corp. vs. Radtke et al,
157 F. 2d, 849 (1949) ..... 62
Potter Press v. C. W. Potter, Inc.,
303 Mass. 485, 22 N.E. (2d) 68 ..... 58
Prudential Life Ins. Co. v. Pearson, 188 S.W. 513, 515 ..... 68
Pullman Palace Car Co. v. Mo. Ry. Co., et al,
115 U.S. 57, 29 L. ed. 409 ..... 21

R.

Raleigh Co. v. Land, 279 S.W. 810, 813 (Tex.Com.App.) ..... 68
Rosenberg Bros. & Co. v. Curtis Brown & Co.,
260 U.S. 516, 67 L. ed. 372 ..... 29
Rosenberg Bros. & Co. v. Curtis Brown Co.,
160 U.S. 516, 67 L. ed. 372 ..... 56
Rosenberg Bros. & Co. vs. Curtis Brown Co.,
160 U.S., Supra Mr. Justice Brandeis ..... 56
R. R. vs. Harris, 12 Wall. U.S. 65 ..... 47

S.

Sessions v. Johnson, 95 U.S. 347 ..... 54
Shelton v. Marshall, 16 Tex. 344, 363 ..... 69
Smith v. Rines, 22 F. Case No. 13,100 ..... 58
Spiller v. Atchison, Topeka & S. F. Ry. Co.,
253 U.S. 117, 121, 40 S. Ct. 357, 60 L. ed. 713 ..... 20

T.

Thompson v. Murphy, et al, 93 F. 2d, 38, 40 C.C.A., 8th Circuit, Mr. Justice Sanborn.....29, 56
Thompson v. Murphy, Supra, Justice Sanborn.....56, 65
Toledo Scale Co. v. Computing Scale Co., 261 U.S. 399, 418, 43 S. Ct. 458, 67 L. ed. 719.....20
Toledo Scale Co. v. Computing Scale Co., 261 U.S. 399, 418, 67 L. ed. 719 .....23
Twining v. New Jersey, 211 U.S. 78, 29 Sup. Ct. 14, 53 L. ed. 97 .....17, 50

U.

United States v. Braunstein, 168 F. 2d., 749, (1949).....62
United States v. Gulf Refining Co., 268 U.S. 542, 545, 46 S. Ct. 587, 69 L. ed. 1082.....20
United States v. Wupperman, 215 Fed. 135.....30, 58

W.

Western Contracting Corp., et al v. National Surety Corp., 163 F. 2d, 456 .....62

---

CONSTITUTION

Constitution of the United States, Fifth Amendment .....6, 14, 35, 38, 49, 72

LAW REVIEWS

Harvard Law Review, Vol. 30, 676.....47

RULES OF CIVIL PROCEDURE

Rule 12(b) .....36, 43, 44
Rule 10(c) .....37, 42, 43
Rule 8(d) .....42
Rule 33 .....38
Rule 11 .....43
U. S. District Court Rules—Rule 12(b), 10(c).....21

## STATUTES

Clayton Act ..... 55
Sherman Act, Sect. 7 ..... 39, 55
Clayton Act, Sect. 4 ..... 39
U.S.C.A. Title 15, Sect. 15 ..... 5, 7, 34, 39
U. S. Statutes, Title 15, Sect. 15, p. ..... 5

## TEXTBOOKS

Jurisdiction of the Supreme Court of the United States, Robertson & Kirkham, 624 ..... 19
Moore's Federal Practice, Cum. Supp., Vol 2, p. 45 ..... 30, 58
Moore's Federal Practice, Vol. II, 2146 ..... 31, 57
Moore's Federal Practice, Vol. I, 627 ..... 44
Moore's Federal Practice, Vol. I, 1947 Supp., 255 ..... 43
Moore's Federal Practice, Vol. I, 373 ..... 44
Moore's Federal Practice, Vol. I, 549 ..... 44
Moore's Federal Practice, Vol. I, Cum. Supp. (1947) 257 ..... 44
Moore's Federal Practice, Vol. II, Cum. Supp. 45 ..... 58
Pomeroy's Equity Jurisprudence, 5th Ed., Vol. 3, 651 ..... 67
Wigmore, Vol. IV, 1949, Pocket Supp. p. 3 ..... 41

## ARTICLES

Important Oil & Gas Decisions—Texas Bar Journal, by A. W. Walker, 479, 501 ..... 53

## ENCYCLOPEDIAS

11 Amer. Jurisprudence, 578 ..... 56
11 Amer. Jurisprudence, 585 ..... 57
41 Amer. Jurisprudence, 457 ..... 21, 27
41 Amer. Jurisprudence, 578 ..... 29
12 C.J. 613 ..... 30, 58

15 C.J.S. 1028 ..... 56
15 C.J.S. 1034 ..... 57
16 C.J.S. 1265 ..... 50, 51
16 C.J.S. 1266 Footnote ..... 50
17 C.J.S. 672 ..... 69
47 C.J. 70 ..... 54
49 C.J. Sect. 543, 434 ..... 21
62 C.J. 1131 ..... 53
10 Fletcher on Corporations, Perm. Ed., Cum. Supp., 48 ..... 58
10 Fletcher on Corporations, Perm. Ed., 374 ..... 58
10 Fletcher on Corporations, Perm. Ed., 457 ..... 59
10 Fletcher on Corporations, Perm. Ed., 334 ..... 59
10 Fletcher on Corporations, Perm. Ed., 907 ..... 40
10 Fletcher on Corporations, Perm. Ed., 961 ..... 56
20 Tex. Jur. 771 ..... 67
Words & Phrases, Vol. 35, Perm. Ed., 619 ..... 44

# Supreme Court of the United States

OCTOBER TERM, 1949

---

**No._____**

---

FLOYD W. DUNAWAY, ALLIE MERLE DUNAWAY, joined by her husband, FLOYD W. DUNAWAY, MATTIE V. DUNAWAY, a feme sole, JOHNNIE FAY DUNAWAY SMITH, joined by her husband, CLARENCE R. SMITH, JULIA DUNAWAY IRICK, joined by her husband, J. T. IRICK, NELLIE DUNAWAY GROGAN, joined by her husband, GEORGE B. GROGAN, MAMIE DUNAWAY CUNDIFF, joined by her husband, E. J. CUNDIFF, MARY FRANCES DUNAWAY IRWIN, joined by her husband, EARL R. IRWIN, RUBY DUNAWAY WRIGHT, a feme sole,

PETITIONERS,

versus

STANDARD OIL COMPANY (New Jersey), CITIES SERVICE COMPANY, NATURAL GAS PIPELINE COMPANY OF AMERICA, COLORADO INTERSTATE GAS COMPANY, SOUTHWESTERN DEVELOPMENT COMPANY,

RESPONDENTS.

---

**ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES AND BRIEF IN SUPPORT THEREOF.**

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE UNITED STATES:

Petitioners pray that a writ of certiorari issue to review the decree of the United States Court of Appeals for the Fifth Circuit affirming the decree of the District Court of the Northern District of Texas, entered on the 19th of December, 1949. Appellants' motion for a rehearing was denied on January 18, 1950. On the 28th day of January, 1950, appellants filed their motion for a stay of mandate pending application in the United States Court of Appeals for a writ of certiorari. This motion was granted by the said court on the same day it was filed.

## I.

## OPINION APPEALED FROM

Opinion of the Court of Appeals affirming its decree denying appellants' motion for rehearing and also the opinion of the Court of Appeals sustaining the decree of the District Court of the Northern District of Texas:—

## DECISION OF THE COURT OF APPEALS

"Before HUTCHESON, WALLER, and RUSSELL, Circuit Judges.

HUTCHESON, Circuit Judge: Alleging: that of the six defendants sued, five are organized under the laws of Delaware, and one under the laws of Colorado; that none of them, except Canadian River Gas Co., has been, or is now, licensed to do business in Texas, but that all, by virtue of combination and conspiracy, were suable in Texas, plaintiffs sued them as conspirators, seeking in concert to monopolize and to impose unlawful restraints on interstate commerce in connection with the production, transportation, and sale of natural gas.

Alleging with considerable fullness the details of the organized concert of action to effect the combination and conspiracy, and that it had resulted in damages to plaintiffs as lessors and owners of gas producing properties, in the sum of $920,000.00, the complaint prayed judgment against the defendants individually and jointly for treble damages.

The complaint alleging that the officials, agents, and employees of the Canadian were also agents of the other named defendants, and that service of papers on any one of them constitutes valid service on the respective defendants, the summons upon all defendants in this action was served 'by delivering to E. C. Wagner (Vice-President of Canadian Gas Co.), the alleged agent of each of the above named companies, a copy of this summons and a copy of the bill of complaint attached'.

Each of the defendants, except Canadian, filed motion to quash the service, and each, except Standard Oil Company, moved to dismiss the action for want of jurisdiction and venue. Each of the motions to quash was sustained, the case was dismissed as to each of the moving defendants, and plaintiffs appealed from each of the orders.

Appellees, moving to dismiss the appeal as from not final, but interlocutory, orders, and pointing out: that the suit presented not many causes of action, one against each of the defendants, but one cause of action against all of the defendants jointly, for the damages inflicted by them acting in concert; and that the suit is still pending as to Canadian; urge upon us, upon the authority of our case, *Hunteman v. New Orleans Public Serv. Co., Inc., et al,* 119 F(2) 465, and similar cases, that the appeal be dismissed.

Appellants, on their part, as vigorously insist that the invoked cases are not applicable here.

We cannot agree with appellants. We think it too clear for argument that the authorities appellees cite are controlling here. The action brought is one against the six defendants for the consequences of their joint and concurrent action. The dismissal of the five defendants has not brought it to an end. The orders are interlocutory and, therefore, subject to be set aside or modified at any time until the whole cause is disposed of, and being interlocutory, they are, therefore, not appealable. The appeals should be and they are hereby

DISMISSED.

WALLER, Circuit Judge, specially concurring:

If the opinion in our case of *Hunteman v. New Orleans Public Service Co., Inc., et al.*, 119 F. 2d 465 is correct—and its correctness seems to be supported by much authority—then the orders quashing the process were interlocutory and the appeal is properly dismissed. But on account of the apparent finality with which some of the defendants were dismissed out of the case because of the showing that they had never transacted business in the State of Texas, it seems to me to be incorrect to say that the dismissal orders in this respect were interlocutory.

Since the facts upon which the motions were predicated were neither disputed nor the evidence supporting same disproven, it would seem that such orders were without error and ought more properly to be affirmed. Without doubt, the orders quashing the process are interlocutory, but I deem the orders dismissing the defendants because of non-suability in Texas to have the quality of final judgments.

New Orleans 6, La.
January 18, 1950

"Mr. Arthur H. Bartelt

. . . . . .

Dear Sir:

I beg to advise you that the court today entered an order denying the Petition for the Rehearing in re—

No. 12861
FLOYD W. DUNAWAY, ET AL., Appellants,
vs.
STANDARD OIL COMPANY (NEW JERSEY), ET AL., Appellees.

No opinion was rendered in connection therewith.

Yours very truly,
Oakley F. Dodd Clerk"

II.

STATEMENT AS TO JURISDICTION OF THE COURT

Title 15, Section 15 of the *United States Code Annotated* says:—

"Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any District Court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

---

1/ Kuhn, et al. v. Canteen Food Serv., et al, 150 F(2) 55; Hohorst v. Hamburg-Am. Packing Co., 148 U. S. 262; Atwater v. N. A. Coal Co., 111 F(2) 124; Hunter v. Fed. Life Ins. Co., 103 F(2) 192; Southland Ind. v. Fed. Communications System, 99 Fed. (2) 117; Fields v. Mut. Ben. Life Ins. Co., 93 F(2) 559; Lockhart v. N. Y. Life Ins. Co., 71 F(2) 684; Photometric Pro. Corp. v. Radtke, 157 F(2) 849; U. S. v. Braunstein, 168 F(2) 749; Western Contracting Co. v. National Sur. Corp., 163 F(2) 456."

## III.

## NATURE OF THE PETITION

This petition presents a question of jurisdiction—a question which *is collateral to and separate and distinct from the subject of the litigation.* Assuming that the Canadian is a corporate entity, which it is not, (it says that it was properly served with summons and complaint) inasmuch as there is nothing to come before the Supreme Court except the question of jurisdiction applicable only to the appellees, thus whether or not this Honorable Court affirms or overrules the dismissal of the summons and complaint by the District Court and the Court of Appeals is absolutely immaterial so far as the Canadian is concerned.

The controversy in this petition is wholly between petitioners and respondents.

## IV.

## CONSTITUTION, STATUTES AND RULES OF PROCEDURE INVOLVED

The Constitution of the United States, Fifth Amendment—pages in Petition for Certiorari, 12, 18, 27, 28.

Statutes of United States—Title 15, Section 15 U.S.C.A., pages in Petition for Certiorari, 5, 7.

Rules of Procedure for District Courts—Rule 12(b), 10(c), p. 21, in the Petition for Certiorari.

## V.

## SUMMARY STATEMENT OF MATTER INVOLVED

(The defendants in the case are Standard Oil Company [New Jersey] hereinafter referred to as Standard, Cities Service Company, referred to as Cities Service, the Can-

adian River Gas Company, hereinafter referred to as Canadian, The Colorado Interstate Gas Company, hereinafter referred to as Colorado, the Natural Gas Pipeline Company of America, hereinafter referred to as Natural, and the Southwestern Development Company, hereinafter referred to as Southwestern.)

## 1. GENERAL SUBJECT OF LITIGATION

This is a suit for damages:

(a) for unlawful drainage of natural gas from underneath petitioners' land resulting from Lessor's failure to perform its duty, by virtue of its lease, to protect petitioners' land from being drained of its natural gas by near and adjacent producing wells. Canadian claims to be the Lessor.

(b) Lessees' failing to pay the price per MCF provided for in one of the leases of petitioners.

(c) Triple damages perpetrated upon petitioners, innocent third party victims, arising out of respondents' violations of the Federal Anti-Trust Laws as provided for under Title 15, Sec. 15, *U.S.C.A.*, as just stated herein.

The petitioners, mother and son and several daughters, are the owners of a tract of land in Hutchinson County, Texas containing approximately 480 acres involved in this litigation on which there are three producing natural gas wells. Petitioners' land is fairly well in the middle of the Panhandle gas field of Texas, one of the largest if not the largest in the United States. On January 14, 1928, petitioners executed their oil and gas lease on approximately 700 acres to J. B. Harris and W. J. McKinney, lessees. Exhibit A, Tr. R. 34. This was by two leases, one being of a minor daughter with the mother being the appointed guardian. Exhibit B, Tr. R. 45. On January 14, 1928, J. B. Harris and W. J. McKinney assigned these

leases to the respondents, the Canadian. The said lease still stands in the name of the Canadian River Gas Co. Tr. R. 6.

The two leases executed by the Dunaways are exactly the same as to the royalty provision except that in the first one, Exhibit A, the royalty provides for a "thirteen-fourteenths of a one-eighth (1/8th) of the proceeds of the sale thereof", and the minor daughter received a one-fourteenth of a one-eighth (1/8th) of the proceeds of the sale of the gas.

Attention is called to the phrase "OF THE PROCEEDS FROM THE SALE OF GAS". This means that the price is determined by the price received by lessess when it sells the gas. This is an unusual royalty provision, yet couched in definite, clear language impossible of being given more than one meaning. Canadian being a mere department of Standard or even a department of Colorado, as contended by Natural in its petition, the price for which the gas was sold to Colorado or whoever the lessee was at the gates of Denver or other cities was 40¢ MCF.

## 2. FACTS INVOLVED IN THE APPEAL

Petitioners served summons and complaint upon each one of the six alleged defendant corporations by serving their alleged agent, E. C. Wagner, Vice-president of the alleged Canadian Corporation. The Canadian has admitted that it was served as just stated. However, the respondents, the othe five alleged corporations, deny that E. C. Wagner was their agent and therefore claim that they have not been served.

Petitioners in their complaint of 178 pages show facts and records proving that the Canadian, Colorado, Natural, and Southwestern are nothing more than departments, instrumentalities, agents, adjuncts and alter egos of Stand-

ard and Cities Service. They also set out in their complaint that the Standard and Cities Service are their lessees and further that those two corporations, which are bona fide corporate entities, are the owners of all the oil properties standing in the name of Canadian River Gas Company. Those two companies are not licensed to do business in Texas, nor are the four other alleged corporations, except the Canadian.

The foregoing presents the issue in this appeal. However, it is obvious that the issue takes in the beginning of what the respondents call the "Project" and the Memorandum of Stipulations, the all-controlling instrument, from its inception on April 5, 1927 down to this day. Most of the provisions of that instrument dealing with controlled production, fixing of prices, and restraint of trade and their monopolistic tendencies are still in effect today.

It was through the Memorandum of Stipulations that the Standard, Cities Service, and Southwestern caused Canadian and Colorado to be organized. The major contracts between those two companies were made by the tripartite before the Canadian and the Colorado were organized, as the Memorandum of Stipulations shows. These contracts, with slight changes and extensions, have been kept in force by the "Project". The first oil and gas lease executed between Petitioners and Canadian was in 1928. Thus the history of the petitioners' gas wells runs parallel and somewhat interwoven with that of the "Project". In the case of *Colorado Interstate Gas Company and Canadian River Gas Company vs. Federal Power Commission,* 142 F. 2d 943, and in the same case in the Supreme Court, 324 U. S. 581, the history of the "Project", which includes the respondents and other Companies, came out in the voluminous testimony taken during the trial.

## 3. THE CONSPIRACY AND ITS MEMORANDUM OF STIPULATIONS

The combination and conspiracy herein described and complained of had been and still is in active continuous existence since on or before April 5, 1927, and has been participated in continuously by each of the defendants herein and five or six more alleged corporations who also are tools and instrumentalities of the original three conspirators, but are not named as defendants.

The initial step in furtherance of said combination and conspiracy was the execution of an unlawful written agreement designated by name as "Memorandum of Stipulations", sometimes hereinafter referred to as the "master contract" and the "project", executed by the Standard Oil Company of New Jersey, Cities Service Company and the Southwestern Development Company.

The evident objective of the foregoing instrument was to place one integrated whole, that is, to monopolize the whole industrial circle of the natural gas industry from its ownership in the ground until the gas is burned by the consumers. To such a plan the Panhandle gas field, together with the north central states, with their large cities and great agricultural expanse, furnishes the strategic position necessary for the "Project" outlined in the Memorandum of Stipulations. The "project" in short, called for the organization of two or more alleged subsidiaries which would be mere instrumentalities through which the "project" was to be worked out, which was to have one subsidiary own the gas reserve and be also the producer of the natural gas, a second subsidiary transport the gas to the cities and industrial centers and agricultural areas to be sold at the city gates and place of the consumer and there to be purchased by wholly owned companies

of the Cities Service. The subsidiaries were thus to be and were the ones that earned the money. But through stock ownership the earnings of the subsidiaries were to be funneled into the treasuries of the Standard Oil Company and Cities Service through stock ownership and from there to the stockholders of those companies. *Through this competition was greatly lessened, prices were fixed, production controlled, and restraints placed upon interstate commerce.*

## 4. ORIGINAL CONTRIBUTION OF EACH MEMBER OF THE TRIPARTITE

The Southwestern Development Company, a project controlled by the Rockefeller interests, owned all the stock of the Amarillo Oil Company. The latter company had under oil and gas lease 260,000 acres, more or less, on which said company owned a great number of producing gas wells. Thus there already existed the necessary gas reserve and production which the "project" called for. Cities Service Company, through its wholly owned Public Service Company of Colorado, had (a) a franchise for the sale of manufactured gas to the public in Denver, Colorado; (b) through its wholly owned Colorado-Wyoming Gas Company and Cheyenne Light, Fuel & Power Company, owned and controlled a franchise to distribute and sell manufactured gas in Cheyenne, Wyoming. Standard Oil Company had the money necessary to carry out the "project" and was willing to provide the enterprise with the amount needed. Furthermore, the Rockefeller interests had under their full control the iron mines of the Colorado Fuel and Iron Corporation at Pueblo, Colorado which was a very large consumer of natural gas and in which, in December, 1939, the Rockefeller interests owned 50.38 per cent of the voting stock.

## 5. FACTS IN THE BRIEFS OF THE GOVERNMENT'S ATTORNEYS IN THE CASE OF COLORADO INTERSTATE GAS COMPANY VS. FEDERAL POWER COMMISSION, 142 F. 2d. 943, AND IN THE SAME CASE IN THE SUPREME COURT OF THE UNITED STATES, 324 U. S. 581, 89 L. Ed., 807-902.

Excerpts from these briefs are to be found in petitioners' complaint as to the Circuit Court, Tr. R. 14-17 and as to the Supreme Court, Tr. R. 17-19.

### (a) BRIEF IN CIRCUIT COURT OF APPEALS

"Canadian Company and Colorado Company *are associated corporate entities and their properties were designed to operate* and have, since the construction of the 'Denver Line' (the Colorado Company) in 1928, been operated as a *single enterprise, or business unit.*

"The' incorporation of these two Companies, the transfer of gas leaseholds to Canadian Company from its 100% affiliate, Amarillo Oil Company, and the construction of the pipelines, compressor stations and other essential property units of the Companies were the result of a joint-undertaking entered into on April 5, 1927, between Southwestern Development Company, Cities Service Company, and Standard Oil Company (N. J.).

"The primary objectives of said undertaking were (a) the sale of natural gas at the city gate of Denver to Cities Service Company's subsidiary, Public Service Company of Colorado, for distribution and resale by the latter-named Company to domestic, commercial, and industrial users in the said city and environs; and (b) the supplying of the requirements of natural gas to Colorado Fuel and Iron Company (subsequently changed to 'Colorado Fuel and Iron Corporation') at Pueblo, Colorado, for industrial use by the said-named Company. The obtaining of these two markets was the essential prerequisite to the construction

of the Canadian Company-Colorado Company pipe line, sometimes referred to as the 'Denver Line'. In the absence of either one of these two markets, the line would not have been built.

"The agreement of April 5, 1927 (Memorandum of Stipulations) (Ex. E) *brought to fruition a 'pooling' of interests in the three signatory companies, or a combination of certain of their resources, essential in making the project feasible.* In other words, (a) Southwestern Development Company, through a subsidiary, had certain gas leaseholds and producing properties situated in the Texas Panhandle field, heavily indebted and with only an inadequate pipeline market outlet; (b) *Cities Service interests controlled the resale market for gas* at Denver and Pueblo, Colorado, but had *no adequate supply of natural gas* and no pipeline facilities; nor were they able to secure a sufficiently large industrial market to justify the construction of a pipe line from the Panhandle field in Texas; (c) *Standard Oil Company and the Rockefeller interests* had adequate funds available; had a trained personnel familiar with the construction and operation of natural gas pipe lines and could profitably utilize natural gas as fuel for their Colorado Fuel and Iron plant at Pueblo. However, they were unable to obtain the resale market outlet at Denver and Pueblo, *both of which were controlled by Cities Service interests.*

"The Agreement of April 5, 1927 (Memorandum of Stipulations), (Ex. E), provided in detail for the organization of the 'Denver Pipeline Project'. (Colorado Company). Under its terms—

Southwestern Development Company a 'Rockefeller project' (then subject to control by the Rockefeller interests), 'was to transfer to a new subsidiary' certain leaseholds and gas-producing properties it controlled, situ-

ated in the Panhandle gas field 'Amarillo field' in the State of Texas, and to develop such properties into a source of supply, primarily for the 'Denver Line.' In compliance with this provision, Canadian Company was formed;

Standard Oil Company (N. J.) was to form a corporation (Colorado Co.) for the purpose of constructing, operating and maintaining a natural gas pipe line and appurtenant facilities for the transmission and sale of natural gas. Such facilities were to connect with those of the company providing the supply of gas (Canadian) and extend to the outskirts of the city of Denver in Colorado. Pursuant to this provision, Colorado Company was formed;

The third participant, Cities Service Company, through its subsidiaries (Public Service Company of Colorado and Pueblo Gas and Fuel Company) was to secure franchises in the cities of Denver and Pueblo, respectively, for the sale of natural gas for resale in the said cities and in nearby areas;

As a fourth condition, the agreement provided for Colorado Company supplying directly the requirements of Colorado Fuel & Iron Company (now Colorado Fuel & Iron Corporation) at Pueblo, Colorado, of natural gas for fuel purposes."

*"Canadian Company's capital structure has consisted throughout its history of capital stock, issued to Southwestern Development Company for a consideration of $1.00 together with 6% bonds and long-term 6% promissory notes held by Colorado Company* * * * Tr. R. 16.

"As heretofore stated, Canadian and Colorado Companies have been operated as a single business since the origin of the project in 1928. Canadian Company's bonds

and notes have been owned by Colorado Company and its stock by Southwestern Development Company. Colorado Company's stock has been owned by Southwestern Development Company (or Consolidated Oil Corporation), Standard Oil Company (N. J.) and Cities Service Company. *The two Companies have had the following common directors and officers at various periods between June, 1928 and December 31, 1939, namely, W. S. Fitzpatrick, N. K. Moody, Albert R. Jones, R. W. Gallagher, and P. C. Spencer.*

"Standard Oil Company (N. J.) and the Rockefeller interests not only furnished the entire cash for this project, they remained in complete control of it, to the extent of supervising the distribution of funds, even during the construction period. *Practically all the officers and directors of both Colorado and Canadian Company were recruited from the staff of Standard Oil Company's organization.*" Tr. R 17)

(b) BRIEF OF GOVERNMENT ATTORNEYS IN THE SUPREME COURT OF THE UNITED STATES

"Canadian and Colorado were incorporated and financed, and are operated, pursuant to an agreement (Memorandum of Stipulations) dated April 5, 1927, between Southwestern Development Company ('Southwestern'), Standard Oil Company (N. J.) ('Standard') and Cities Service Company ('Cities Service'). By this agreement Southwestern, Standard and Cities Service pooled their respective gas reserves, finances and distribution markets, to bring natural gas from the Panhandle field to the Denver and Pueblo, Colorado, markets. This pooling was effected in the following manner:

"Southwestern, through a wholly owned subsidiary, Amarillo Oil Company ('Amarillo'), controlled certain gas leaseholds and producing properties in the Texas Panhandle field, which Southwestern agreed to transfer to a new

subsidiary (Canadian) which it would organize for that purpose. Standard agreed to form a new corporation (Colorado) and to finance its construction of pipeline facilities to the Denver market and intermediate points including Pueblo. Cities Service was to procure franchises through its subsidiaries under which natural gas could be distributed in Denver and Pueblo. It was *agreed that Canadian would sell gas to Colorado at 'cost' for at least 20 years from 1928*, such 'cost' to include amortization of all of Canadian's indebtedness over the twenty-year period and to be decreased by any profits Canadian might obtain from other sources, including local sales permitted by Colorado. *Canadian, under the 'cost' contract, would have nothing available for dividends* on its common stock during the first 20 years and so long thereafter as Colorado might choose to purchase its gas at 'cost'.

"Pursuant to the agreement, *Southwestern organized Canadian, to which was transferred the gas lease-holds and producing properties of Amarillo, also a wholly-owned subsidiary of Southwestern.* The *cash consideration* for this transfer was $5,000,000, stipulated in the tripartite agreement advanced by Standard for this purpose at 6% interest. To repay the advance and to finance the acquisition and construction of *additional facilities, Canadian issued $11,000,000* of twenty-year 6% sinking fund bonds, which, in turn, were purchased by Standard, in accordance with the 1927 agreement.

"As had been further agreed, Standard organized Colorado with $2,000,000 par value of 6% preferred stock and 1,250,000 shares of no par common stock, and paid $1,000,000 in cash for its portion (42½% of the common stock, the remaining 15% of the common stock being issued to Cities Service. *It was implicit in the tripartite agreement, therefore, that Southwestern, Standard, and Cities Service*

*would receive their profits from the operations of the enterprise by way of dividends on Colorado's stock."* Tr. R. 17-19.

For further statement of facts see Appellants Motion for Rehearing filed by petitioners in Court of Appeals. Tr. R. 386 to 427.

## VI.

## QUESTIONS PRESENTED AND REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

1. The decisions of the said Court of Appeals in going on with the hearing on March 14, 1949, to pass upon the motions of the respondents to dismiss and quash petitioners' summons and complaint served upon E. C. Wagner on the grounds that there was improper venue and that E. C. Wagner on whom the papers were served was not an agent of the respondents and the Court's granting said motions of defendants when that Court and the defendants knew that Arthur H. Bartelt, the attorney for the plaintiffs, had a prior setting for a case before the Honorable Judge Quin in the State District Court at San Antonio, Texas, deprived plaintiffs of their natural and vested constitutional rights of being given a reasonable opportunity of being heard in defense of those rights and protecting themselves from arbitrary powers, before any order would be issued, all in violation of the 5th Amendment of the Constitution of the United States. Details are contained in four or five letters. (See Tr. R. pp. 339-349.) This decision of the District Court is *in conflict* with the decision of this Honorable Supreme Court in the case of *Twining v. New Jersey,* 211 U. S. 78, 29 Sup. Ct. 14, 53 L. Ed. 97.

2. The decision of the Court of Appeals attempts to sidetrack the most fought over and most important and con-

trolling issue in this action and also in this appeal. This issue is presented by plaintiffs' complaint of 178 pages of facts and records proving at least prima facie that the Canadian, Colorado, Natural, and Southwestern are agents, departments, tools and alter egos of Standard and Cities Service, making the District Court and the Court of Appeals duty bound to take those well pleaded facts and records as true. This they failed to do. These facts and records, the latter being those of the respondents, contain very serious evidence pertaining to the defendants. They have avoided denying these facts but have kept silence concerning them and have put up and used as defensive screens motions to keep out of the record the facts and issues presented by plaintiffs' complaint.

Likewise, the Court of Appeals is totally silent on the issue as to whether or not the Canadian, Colorado, Natural and Southwestern are mere departments, agents, tools and alter egos of Standard and Cities Service. A reading of the opinion of the Court of Appeals, particularly the first three paragraphs, presents an issue which is not in the case, namely, that plaintiffs were trying to obtain jurisdiction by the Court by merely serving the Canadian, a corporate entity, with summons and complaint and thereby expected that the Court would thus obtain jurisdiction over the other defendants, assuming that they are all corporate entities, which the heretofore named are not. It is submitted that the opinion of the Court of Appeals as a whole is an erroneous statement of the issue in the case and in effect is in direct conflict with the Fifth Amendment of the Constitution of the United States in that it denies the due process of law guaranteed to plaintiffs by the said Amendment.

Furthermore, the foregoing decision of the Court of Appeals has departed from the accepted and usual course of judicial proceedings and has sanctioned such departure by the lower court, resulting in a miscarriage of justice so as to call for the exercise of the Supreme Court's power of supervision.

3. The respondents are not licensed to do business in Texas. The history of nearly 23 years of the project clearly shows that the Canadian was organized for the purpose of being the catspaw to hold title to the gas reserves in the Panhandle of Texas and to produce the natural gas and transport it out of Texas and turn it over to the Colorado and Natural. *It is obvious that the appellees will not come into Texas,* at least not until the statute of limitations has run, to submit themselves to the Texas courts. Consequently, the orders of the District Court dismissing the summons and complaint against the defendants *are final.* This appeal, therefore, presents a situation, assuming for argument's sake, that these orders are interlocutory, which petitioners emphatically deny and have shown not to be true, that gives this Honorable Court by writ of certiorari the power to "prevent the extraordinary inconvenience and embarrassment in the conduct of the cause". In other words, we have here "extraordinary exceptions and circumstances justifying the issue of the writ to review *non final* judgments or decrees of the Circuit Courts of Appeals" to prevent the miscarriage of justice.

*Robertson & Kirkham, Jurisdiction of the Supreme Court of the United States,* p. 624:

> "Whether certiorari shall be granted to review a non-final judgment or decree of the Circuit Court of Appeals raises a question of propriety, not of

power. Power exists in the Supreme Court to issue the writ whether the judgment or decree of the Circuit Court of Appeals *is or is not a final disposition of the controversy.*"

*Robertson & Kirkham, Jurisdiction of the Supreme Court of the United States*, p. 623, citing the following many cases:

Forsyth v. Hammond, 166 U. S. 506, 513, 515, 17 S. Ct. 665, 41 L. Ed. 1095;

Toledo Scale Co. v. Computing Scale Co., 261 U. S. 399, 418, 43 S. Ct. 458, 67 L. Ed. 719;

Spiller v. Atchison, Topeka & S. F. Ry. Co., 253 U. S. 117, 121, 40 S. Ct. 466, 64 L. Ed. 810;

Hanover Star Milling Co. v. Metcalf, 240 U. S. 403, 408, 409, 36 S. Ct. 357, 60 L. Ed. 713;

American Construction Co. v. Jacksonville, T. & K. W. Ry. Co., 148 U. S. 372, 383, 13 S. Ct. 758, 37 L. Ed. 486;

Forsyth v. Hammond, 166 U. S. 506, 511-515, 17 S. Ct. 665, 41 L. Ed. 1095;

Du Pont de Nemours Powder Co. v. Masland, 244 U. S. 100, 102, 37 S. Ct. 575, 61 L. Ed. 1016;

Chicago, Burlington & Quincy R. R. Co. v. Willard, 220 U. S. 413, 31 S. Ct. 460, 55 L. Ed. 521;

United States v. Gulf Refining Co., 268 U. S. 542, 545, 46 S. Ct. 597, 69 L. Ed. 1082.

4. The decision of the Court of Appeals, in that it refused first of all to give any consideration whatsoever to the allegations of the plaintiffs' complaint covering about 178 pages, most of which contained allegations of fact and copies of documents and records of the defendants showing that the same series of respondents, the Canadian,

Colorado, Natural, and Southwestern, are departments, instrumentalities and alter egos of Standard and Cities Service and in addition refusing to accept as true all the well pleaded allegations of that complaint in determining whether E. C. Wagner was the agent of the Defendants, Standard and Cities Service, *is in conflict* with the decision of the Supreme Court of the United States in the case of *Concordia Insurance Company of Milwaukee v. School District*, 282 U. S. 545, 75 L. Ed., Syll. "upon demurrer all allegations of the compaint which are sufficiently pleaded must be taken as true," and in the case of *Pullman Palace Co. vs. Mo. Ry. Co., et al.*, 115 U. S. 57, 29 L. Ed. 409, a demurrer "admits all facts well pleaded." It is also in conflict with the decision of the Court of Appeals in the case of *Bruner, et al, vs. Johnson*, 35 F. 2d, 493, 8th Circuit, when it said Syll. "Where no evidence was introduced allegations of answers and amendment thereto for purposes of demurrer must be taken as true."

The decision of the District Court is also in conflict with the following authorities:

> "Admissions—a. In General. A demurrer to a pleading admits the truth of all material and relevant facts that are well pleaded whether in reality true or untrue, together with annexed documents and exhibits." 49 *C. J.*, Sect. 543, p. 434.
>
> "It is a universally recognized rule for which citation of authority is hardly needed that for the purpose of testing the sufficiency in law of the facts stated in a pleading, or a demurrer thereto admits or confesses the truth of all properly pleaded facts averred in the pleading attached, * * * " 41 *Am. Jur.* 457.

Said decision of the Court of Appeals is also in conflict with Rule 10(c) of the District Court Rules which, among other things, says "A copy of any written instrument which

is an exhibit to a pleading is a part thereof for all purposes." This applies to exhibits attached to a compaint.

Said ruling of the District Court nullifies not only the general demurrer under the former practice which admits, for the purpose of the motion, all well pleaded facts of the complaint, but also a number of cognate principles such as "complaint must be construed in the light most favorable to the plaintiff, and it should not be dismissed if it is reasonably conceivable that at the trial the plaintiff might establish a cause of action", *Brauch v. Birmingham* (D. C. Iowa) 49 Supp. 229. On motion to dismiss for insufficiency, every presumption and inference from the pleadings must be resolved in favor of the pleader." *Geismer v. Bond Goodwin Inc.*, 49 F. Supp. 299.

Thus in the foregoing decision the Court of Appeals has ignored completely the principle of law universally approved and followed in the past that under a motion to dismiss a well pleaded allegation "must be taken as true." This is untenable and in direct conflict with approved procedure. Furthermore, the opinion on its face shows that the Court has departed from the accepted and usual course of judicial proceedings and also so far sanctioned a departure by the lower court as to require this court to exercise its power of supervision.

> *"It has been pointed out that on certiorari to review a final decree of a Circuit Court of Appeals it can reach back to correct errors occurring in the interlocutory proceedings,* and that neither the failure of parties to apply for certiorari to review an interlocutory ruling nor the denial by the Court of an application made at that stage affects the right to issue the writ to review the final decisions of the court below, nor the scope of review on such writ."

Jurisdiction of the Supreme Court of the United States, Robertson and Kirkham, 624, citing Hamilton Brown Shoe Co. vs. Wolf Bros. & Co. 240 U. S., 251, 258, 259, 60 L. Ed. 629; Toledo Scale Co. vs. Computing Scale Co., 261 U. S., p. 399, 418, 67 L. Ed. 719.

5. The decision of the Court of Appeals contains the following paragraph:

> "The complaint alleging that the *officials, agents, and employees* of the Canadian were also *agents of the other named defendants,* and that *service of papers on any one of them constitutes valid service on the respective defendants,* the summons upon all defendants in this action was served 'by delivering to E. C. Wagner (Vice-President of Canadian Gas Co.), the alleged agent of each of the above named companies, a copy of this summons and a copy of the bill of complaint attached'." Tr. R. 382

The foregoing statement assumes that all these defendants are corporate entities, which plaintiffs vigorously deny. Whether they all are corporate entities or not is the controlling issue in the pending appeal as in the case when tried on its merits. The opinion says that plaintiffs, in effect, baldly say that the "officials, agents and employees of the Canadian were also agents of the other named defendants, and the service of papers on any one of them constitutes valid service on the respective defendants," when, in fact, plaintiffs' complaint contains proof of their contentions. It then continues as follows:

> "* * * The summons upon all defendants in this action was served 'by delivering to E. C. Wagner (Vice-President of the Canadian Company), the

> alleged agent of each of the above named companies, a copy of this summons and a copy of the bill of complaint attached'."

It is apparent that what the Court wishes to convey is that the plaintiffs proposed to secure the jurisdiction of the Court over all the defendants by merely serving a summons and complaint upon the Vice-President of the Canadian — a very senseless idea on the part of the plaintiffs, if true, which it is not. The foregoing statement of the Court of Appeals apparently was prompted by a paragraph in plaintiffs' complaint, Tr. R. 30, and appears in the complaint itself about two pages before the Wherefore Clause. The following is most likely the paragraph of the complaint which the Court of Appeals had before it when the above statement in the opinion was written. It reads as follows:

> *"By virtue of all the foregoing* the officials and agents and employees of the Canadian are also agents of Standard Oil, Southwestern, Cities Service, Colorado, and the Natural Gas Pipeline Company. Service of papers on each one of them as agent of any one or more of them constitutes valid service upon the *respective defendants."* Tr. R. 30

"By virtue of all the foregoing" includes plaintiffs' entire complaint and particularly what immediately precedes the paragraph starting with "by virtue of all the foregoing, etc." which reads as follows:

> "Standard Oil Company, by virtue of the fact that Canadian and Colorado being its instrumentalities, and owning 42½% of the common stock of Colorado and 50% of its preferred stock, is one of the owners of the oil properties standing in the name of the Canadian and has been such owner ever since 1927.

"Cities Service, by virtue of its alleged ownership of 15% of the stock of Colorado which is not a corporate entity and further, if what Natural Gas Pipeline Company says in its petition is true, that Colorado is the true owner of 75% of all the oil properties of the Canadian, is and has been for a number of years the owner of an undivided interest of 15% in the oil and gas properties of the Canadian. Cities Service, therefore, now is and has been doing business in the State of Texas without first being licensed to do business in that state.

"Southwestern, because of its ownership of all of the stock of Amarillo Company and permitting itself and its Amarillo Company to be used by Standard as its pawn and by virtue of its ownership of 42½% of common stock of Colorado and 50% of its preferred stock, also owns an interest in the gas properties now standing in the name of the Canadian and has been such owner since April 5, 1927."

Tr. R. 29, 30.

"That the Canadian River Gas Company and the Colorado Interstate Gas Company and Southwestern Development Company are alter egos, instrumentalities of Standard Oil of New Jersey.

"That Standard Oil Company of New Jersey and City Service are and have always been plaintiffs' lessees.

"That Natural Gas Pipeline Company of America and the Public Service Company of Colorado and Colorado-Wyoming Gas Company are alter egos and instrumentalities of Cities Service Company."

Tr. R. 33.

These paragraphs in the Wherefore Clause summarize the controlling issue in the case and also in the appeal. From these quotations from these paragraphs and the complaint itself it follows that E. C. Wagner was the true

agent of Standard and Cities Service and the latter being the lessees of petitioners and the owners of all the oil properties standing under the name of Canadian, and the other respondents being mere departments, instrumentalities, and alter egos, are in the case by virtue of what they actually were.

In Exhibit F, Tr. R. 86-119, in plaintiff's complaint is to be found the complaint of Natural Gas Company vs. Colorado and the Canadian, filed in the State District Court of Potter County, Texas, on pages 89, 92, 117 and 118. These show that in that petition of the Natural the latter claims that it is the owner of an undivided interest of 15% in the oil and gas properties of Canadian, which are all situated in Texas. It also says that the Colorado is the true owner of 75% of all the oil properties of the Canadian. Assuming that Canadian and Colorado are corporate entities, which they are not, then those two corporations have been doing business in Texas and have been properly served with summons.

It must also be kept in mind that the issue in this appeal is one primarily involving jurisdiction. This carries with it plaintiffs' contention that "for the purpose of the motion, all well pleaded facts are true", supported by the facts and records of every nature contained in plaintiffs' complaint, which makes out a prima facie case to the effect, as maintained by petitioners, that their true lessees are Standard and Cities Service and that the others are merely departments of those two corporations. In determining that issue the District Court and the Court of Appeals have palpably failed to do their duty.

The Courts' failure to take into consideration the phrase "by virtue of all the foregoing" which prefaced the paragraph in plaintiffs' complaint to be found at the bottom of page 30, Tr. R., eliminated plaintiffs' conten-

tion and supporting records in their complaint, including the exhibits, namely, that Standard and Cities Service are the true lessees of petitioners and are the true owners of all the properties of Canadian and that the other defendants are mere agents, departments, etc. of Standard and Cities Service, not by orderly judicial determination but by plain omission in violation of the due process clause of the 5th Amendment of the Constitution of the United States. Going still farther, this presents a situation which gives to this Honorable Court, by writ of certiorari, power to take jurisdiction to "prevent the extraordinary inconvenience and embarrassment in the conduct of the cause" and to prevent the miscarriage of justice. This further presents a situation where the District Court and the Court of Appeals have departed so far from the accepted and usual course of judicial procedure as to call for an exercise of the power of supervision of the Honorable Supreme Court of the United States.

6. The decision of the Court of Appeals in holding that allegations of fact or exhibits attached to the complaint cannot be resorted to by the Court, as it did in effect hold when it said in its order of dismissal of plaintiffs' complaint against Southwestern, T. R. p. 328, "and such proof being uncontroverted", in spite of the 178 pages of plaintiffs' complaint, is in conflict with what is said as to the functioning of a motion to dismiss, whether on a jurisdictional or other defect of plaintiffs' complaint, namely, as the *American Jurisprudence* says in Volume 41, p. 457:

> "It is a universally recognized rule for which citation is hardly needed * * *".

The decision of the Court of Appeals in this case has departed so far from the accepted and usual course of

judicial procedure as to call for an exercise of the power of supervision of the Honorable Supreme Court of the United States.

The decision of the Court of Appeals in approving what Southwestern said in its brief, page 34:

> "It is the position of this appellee, Southwestern Development Company, as stated in the first part of this brief, that the affidavits of appellee before the Court could be met only by controverting affidavits or other proof,"

*conflicts* with Rule 12(b) and the universal ruling of courts.

> "Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or three-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the leader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted."

By virtue of this ruling petitioners have been barred from using their complaint as a defense from the legal assaults of the appellees. The petitioners are entitled to have all the well pleaded facts in this complaint used for their benefit by the Court, particularly the copies of the various instruments included in that which the Court must consider in order that petitioners may make out a prima facie case which the Court is duty bound to take as being the truth. It must be considered that in this case plaintiffs' evidence is in the office files of the defendants, which the petitioners cannot obtain except

through the use of the discovery rules made by Congress and this Court for that very purpose.

Thus by virtue of this ruling of the Court of Appeals and the various other rulings of the District Court and the Court of Appeals, both by affirmative words and in circumstances where silence has the force and effect of positive ruling, petitioners were denied the use of the "New Discovery Rules" in the preparation of their case and thereby have been denied the due process of law guaranteed to them by the 5th Amendment of the Constitution of the United States.

Furthermore, the foregoing decision of the Court of Appeals has departed from the accepted and usual course of judicial proceedings and has sanctioned such a departure by the lower court so as to call for an exercise of the Supreme Court's power of supervision.

7. The decision of said Court of Appeals as to its holding "that the suit presented not many causes of action, one against each of the defendants, but one cause of action against all of the defendants jointly, for the damages inflicted by them acting in concert; and that the suit is still pending as to the Canadian; urge upon us, upon the authority of our case, Hunteman vs. New Orleans Public Service Co., Inc., et al, 119 F. 2d. 465, and similar cases, that the appeal must be dismissed." Tr. R. 382, *is in conflict* with the case of *Rosenberg Bros. & Co. v. Curtis Brown & Co.*, 260 U.S. 516, 67 L. Ed. 372; *Thompson v. Murphy, et al*, 93 F. 2d, 38, 40, 8th Circuit. "The liability of conspirators is joint and several," 11 *Amer. Jur.* 578; "Conspirators are jointly and severally liable for all damages resulting from the conspiracy, each being responsible for the acts of the other in furthering the common design." 15 *C.J.S.* 1028.

8. The decision of said Court of Appeals as to its holding:

> "The action brought is one against the six defendants for the consequences of their *joint and concurrent action.* The dismissal of the five defendants has not brought it to an end. The orders are interlocutory and, therefore, subject to be set aside or modified at any time until the whole cause is disposed of, and being interlocutory, they are, therefore, not appealable. The appeals should be, and they are hereby
>
> Dismissed."

which, summarized, states that the liability of the respondents is merely joint, *is in conflict* with the Clayton Act and the decision of the Court of Appeals of the 7th Circuit in the case of *Northwestern Oil Co., C.C.A. Wis.*, 138 Fed. (2) 967 Cer. denied, 321 U.S. 792, 12 *C.J.* 613, citing *U. S. v. Wupperman*, 215 Fed. 135; *Motley v. Detroit Steel etc. Co.*, 161 Fed. 389.

> "Joint, and Joint and Several Contracts:—Where the obligation is joint, each one of the obligors is bound to the full performance of the contract, and where it is joint and several, any one of the obligors may be held liable upon it."
>
> *Moore's Fed. Prac.*, Cum. Supp. p. 45, Vol. 2.

9. The decision of Circuit Judge Waller, specially concurring, that the opinion in "our case of *Hunteman vs. New Orleans Public Service Co.*, et al, 119 F. 2d, 465" is correct but his decision that the orders quashing the process were interlocutory and the appeal is properly dismissed, is in conflict with authorities cited and to be cited in the petition and supporting brief, in that the liability involved in the Hunteman case is joint while in the case at bar the liability is individual and joint and therefore

the Hunteman and all the cases cited in the footnote of the opinion, Tr. R. 383, in which the liability is also joint, have no application.

> "Tort feasors are not necessary or indispensable to an action against one of the numbers because their liability is both joint and several."
>
> *Moore's Fed. Practice*, Vol. II, p. 2146.

10. The decision of Circuit Judge Waller, specially concurring, when he says "Since the facts upon which the motions were predicated were neither disputed nor the evidence supporting same disproven, it would seem that such orders were without error and ought more properly to be affirmed." *is in conflict* with the authorities cited and to be cited in this petition and in the supporting brief.

11. Just when a corporation is a subsidiary of a parent corporation or when it is an alter ego of another corporation are questions of great importance in the business world and the legal profession. These questions come up very frequently and cause considerable litigation. Their elucidation by this Honorable Court is extremely important to the public interest. That is why the writ of certiorari prayed for should be granted.

Petitioners contend that the allegations contained in plaintiffs' complaint, including the exhibits, cause a prima facie cause of action to the effect that the Canadian, Colorado, Natural and Southwestern are mere agents, instrumentalities, alter egos and tools of Standard and Cities Service. From this it follows that Standard and Cities Service are now and have always been plaintiff's lessees and the owners of all the oil property standing in the name of Canadian, prima facie. Consequently, it also follows that E. C. Wagner was the agent of Standard and

Cities Service at the time that he was served with summons and complaint by the United States Marshal. Standard and Cities Service, therefore, are the only prima facie respondents in the case. From this it follows that the orders of the District Court dismissing the summons and complaints served upon those two respondents are final judgments and are not interlocutory orders as they are the *only respondents* interested in the oil properties.

12. Justice Waller goes half way with the foregoing principle when he says:

> "But on account of the apparent finality with which some of the defendants were dismissed out of the case because of the showing that they had never transacted business in the State of Texas, it seems to me to be incorrect to say that the dismissal orders in this respect were interlocutory.
>
> * * * *
>
> Without doubt, the orders quashing the process are interlocutory, but I deem the orders dismissing the defendants because of non-suability in Texas to have the quality of final judgments."
> Tr. R. 384

That which kept him from going all the way is the case of *Hunteman v. Public Service Company*, supra. An examination will show that that case is as far apart from the case at bar in legal principles as is the South from the North Pole. In the Hunteman case, in the complaint, the plaintiff pleaded "that the injury resulted from their joint and concurrent negligence", there being three defendants in the case. In the case at bar it has been shown herein that the liability is definitely individual and joint. A reading of the cases on the question of finality of orders and judgments always resolves itself as to whether

the liability was joint or joint and several. The Hunteman case was decided correctly by the Fifth Circuit. In the case at bar the decision was erroneous.

WHEREFORE, your petitioners pray that writ of certiorari issue under the seal of this Court, directed to the Court of Appeals for the Fifth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Court of Appeals had in the case numbered and entitled on its docket, No. 12,861, styled *Floyd W. Dunaway, et al, Petitioners vs. Standard Oil Company (New Jersey) et al, Respondents*, to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the judgment herein of the said Court of Appeals for the Fifth Circuit be reversed by this Court and for such further relief as to this Court may seem proper.

Dated this ..... day of ....., 1950.

.....

ARTHUR H. BARTELT,
Attorney for Petitioners,
P. O. Box 190,
Austin, Texas.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1949

---

No. .....

---

FLOYD W. DUNAWAY, *et al*, PETITIONERS,

versus

STANDARD OIL COMPANY, *et al*, RESPONDENTS

---

## Brief in Support of Application for Petition for Certiorari

---

### I.

### OPINION OF THE COURT BELOW

The opinion of the Court of Appeals for the Fifth Circuit is contained on pages 2, 3, and 4 of the Petition for Certiorari. For brevity's sake it is not repeated here. It is also reported in Volume 178 F. 2d, at page 884.

### II.

### JURISDICTION

Title 15, Section 15 of the United States Code Annotated. A copy of the foregoing is to be found on page 5 of the petition for writ of certiorari.

## III.

## NATURE OF THE APPEAL

This appeal presents a question of jurisdiction—a question which is collateral to and separate and distinct from the subject of the litigation. Assuming that the Canadian is a corporate entity, which it is not, (it says that it was properly served with summons and complaint) inasmuch as there is nothing to come before the Supreme Court except the question of jurisdiction applicable only to the appellees, whether or not this Honorable Court affirms or overrules the dismissal of the summons and complaint by the District Court and the Court of Appeals is absolutely immaterial so for as the Canadian is concerned.

The controversy in this appeal is wholly between plaintiffs and the appellees.

## IV.

## SPECIFICATION OF ERRORS

The Court of Appeals erred as follows:

(1) When it deprived plaintiffs of their constitutional right to be heard before judgment was entered against them.

(2) When the most important and controlling issue in this action and in the appeal was sidetracked and an issue whose immateriality was evident on its face was substituted, leaving the issue of the case undertermined, this all in violation of plaintiffs' constitutional rights under the 5th Amendment of the Constitution of the United States.

(3) When it held that the District Court's five separate orders granting appellees their motion to quash were interlocutory, when, in fact, they were final because Standard and Cities Service were foreign corporations not

licensed to do business in Texas and when three other alleged appellees plus Canadian were in fact departments of Standard and Cities Service and therefore were not corporate entities.

(4) When it refused to give any recognition whatsoever to the averments in plaintiffs' complaint of 178 pages and when it absolutely refused to apply the universally accepted principle of law that "for the purpose of the motion, all well pleaded facts are true."

(5) When it affirmed the statement of the District Court in its decision, "and such proof being uncontroverted by plaintiffs". Tr. R. 328, referring to the affidavits filed by the appellees.

(6) When it held that the allegations therein contained can be controverted only by the taking of testimony or by sworn affidavits or, as expressed in the brief of the Southwestern, page 34, where it is said "could be met only by controverting affidavits or other proof." This is in direct conflict with the decision of the United States District Court of Pennsylvania, *Kaffenberger v. Kremer*, (D.C.-Pa) 4 Fed R. Dec. 478, "where defendant filed an affidavit in support of its motioh to dismiss and plaintiff filed no affidavit in opposition thereto, the motions must be decided on the facts averred in the complaint and defendant's affidavit which, for the purpose of the motion, will all be accepted as true." This principle is recognized and followed universally.

(7) When it gave its sanction to the contention of the appellees that a motion to quash is something not inclusive within a motion to dismiss as defined in Rule 12(b).

(8) When it overruled plaintiffs' contention that Standard and Cities Service, being the only corporate entities of the appellees and not licensed to do business in Texas, thereby beyond the jurisdiction of this United

States District Court and thus, by virtue of the undisputable facts, the order could not be otherwise than final.

(9) When in effect, it overruled plaintiffs' contention that the other four alleged appellees, being departments of Standard and Cities Service, were not corporate entities.

(10) When it approved the contention of the defendants that the exhibits attached to the complaint do not stand in the same evidentiary status as the allegations contained within the complaint. This contention conflicts with Rule 10(c) which says "A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes."

(11) When it approved appellees' motion, assuming that Canadian, Natural, Colorado and Southwestern were corporate entities after plaintiffs had served them with their 178 page complaint of facts, most of which were contained in the copies of their own contracts and records in their own offices to the effect that they are not corporations but mere departments of Standard and Cities Service. Without attempting to disprove the averments in plaintiffs' complaint and exhibits thereto attached, defendants completely ignored the same except that each one filed one or more affidavits which contained nothing more than conclusions.

(12) When it held that all the appellees are just jointly liable when, in fact, they are severally and jointly liable both as to the facts and the law applicable, as shown by the plaintiffs' complaint, briefs, and petition and by all the facts in the case.

(13) Circuit Judge Waller, in his specially concurring opinion is right when he says:

> "But on account of the apparent finality with which some of the defendants were dismissed out of the case because of the showing that they had

> never transacted business in the State of Texas, it seems to me to be incorrect to say that the dismissal orders in this respect were interlocutory."

but spoiled it all in holding that the defendants were jointly liable the same as the defendants in the Hunteman case, supra, when the two cases are not parallel and are fundamentally different as to the real controlling features of each. In the Hunteman case, 119 Fed. 2d 465, the defendants are jointly liable, as the plaintiff alleged in his complaint. In the case at bar the defendants are not just jointly liable but jointly and severally, case after case being cited to that effect by plaintiffs' counsel. On the other hand, neither the defendants' counsel nor the Court of Appeals has cited and analyzed one single case showing them to be only jointly liable.

(14) When it affirmed the orders dismissing en masse each and every interrogatory served on each of the defendants under Rule 33 ten or more days after the commencement of the action. A large portion of plaintiffs' testimony in the form of contracts, letters and memoranda are in the offices of the defendants. Without the rules of discovery of which the interrogatories are a major part plaintiffs are barred from obtaining necessary evidence from the papers in defendants' offices, amounting under the existing new rules to the denial to the plaintiffs of the due process of law under the Fifth Amendment.

The reason for the principle of law so universally followed by all courts and mentioned herein time and time again with authorities cited that under a motion to dismiss a complaint, well pleaded allegations must be taken as true is this: without the existence of that principle in many cases a situation would exist permitting the defendant to manipulate the plaintiff out of court, cases where plaintiff's evidence is in the form of written records and

documents in the possession of the defendants. Courts have been conscious of that situation and therefore in order to prevent great injustice they have legislated decisions that all well pleaded facts impose a duty upon the judge to take those allegations to be true.

Situations of the kind just described occur very frequently in litigation in which corporations are involved. That is the situation in the case at bar.

The new district court rules greatly widening the scope of the discovery statutes have behind them that very situation and therefore the discovery rules, including the use of interrogatories, production of documents, and adverse examination were enacted.

(15) When it granted defendants' motion dismissing plaintiffs' action against the appellees. As shown by plaintiffs' complaint, appellees have been and still are unlawfully draining natural gas from underneath plaintiffs' land, as set out in plaintiffs' complaint, and transporting it interstate and selling it to consumers in other states. Said unlawful taking constitutes a continuous conversion of said excess drainage and impresses the same with a constructive trust in favor of the plaintiffs and also creates a joint and several liability on the part of appellees to plaintiffs.

(16) In its granting the defendants' motions for dismissal of plaintiffs' complaint for lack of venue when Title 15, Section 15 fixes the venue when it says "in any district of the United States in the district in which the defendant resides or is found or has an agent, ***." Sect. 7 of the Sherman Act, where it says "in the district in which the defendant resides or it"; Section 4 of the Clayton Act says that any person "injured in his business or

property by reason of anything forbidden in the anti-trust laws", might sue therefore in the district "in which the defendant resides or is found or has an agent."

*Fletcher's Cyc. of Corporations*, Perm. Ed., Vol. 10, 907.

(17) When it sustained what Cities Service said in its brief on page 7, namely,

> "The affidavits filed by this defendant upon which the court heard and determined the motions in question were never controverted by plaintiffs either by counter-affidavits or other evidence of any kind to support the attempted service and venue, but plaintiffs relied entirely upon the allegations in their complaint."

When it said in its order "Such proof (affidavits of defendants) being uncontroverted by plaintiffs" (Tr. R. 328) that amounted to decreeing that plaintiffs' complaint was a complete nullity fit only to be cast into the judicial discard, especially with the appellees all being non-resident corporations.

(18) When it sustained the statement of Colorado in its brief on page 2,

> "Because of the *unorthodox organization of appellants' brief*, we believe we can best present the case by first demonstrating the falsity of appellants' major premise, that the unproved exhibits attached to appellants' complaint, and the complaint itself, should have been accorded probative value on the hearing to quash service of process."

In other words, in a case of diversity of citizenship where the jurisdiction of the federal court depends upon whether or not the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000, suppose that plaintiff has alleged facts in his complaint

showing prima facie that the amount in controversy does exceed $3,000 plus interest and costs and defendant files a motion to quash the summons and complaint together with an affidavit in which the affiant states facts showing that the amount of the claim is less than $3,000 plus interest and costs. Assume further that the plaintiff does not file any counter affidavits. Under such circumstances is the Court forbidden to read and take into consideration the well pleaded facts in plaintiff's complaint, thus being compelled to believe the affidavits of the defendant, and to dismiss plaintiff's summons and complaint? The defendants cite no authorities to that effect, nor can they. The universal rule is that the court is in duty bound to read plaintiffs' complaint carefully and studiously to see if it does have jurisdiction. Thus if the complaint does show prima facie that the court has jurisdiction, the court is in duty bound so to find.

The case at bar is still in what might be called the motion stage and is not before this Honorable Supreme Court of the United States on its merits. Therefore the universal principle of law applied is that in a "motion to dismiss" or a "motion to quash", regardless of its designation, well pleaded allegations "must be taken as true."

> "Admissions have probative value not because they have been subject to cross-examination and therefore satisfy the hearsay rule, but because they are statements by a party opponent, inconsistent with his present position as expressed in his pleadings and testimony. It is not even necessary that such evidence should have been given *in court or under oath.*"
>
> *IV. Wigmore 1949*, Pocket Supp. p. 3

Wigmore gives as reason for the rule "because they are statements by a party opponent inconsistent with his present pleadings and testimony."

"Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes."
*Rule 10(c)*

Rule 10(c) puts exhibits attached to a complaint at a part with the regular averments contained in the complaint. The exhibits in plaintiffs' complaint contain practically nothing outside of statements in writing—contracts, pleadings, affidavits, etc. of the defendants and their agents and their contents are all known by them. In other words, those exhibits are admissions of the defendants, statements "inconsistent with" their present statements in their motions endeavoring to secure the dismissal of plaintiffs' summons and complaint, thereby avoiding their being obliged to answer and explain what is contained in their own records in their offices. These exhibits are a part of plaintiffs' complaint and therefore, according to Wigmore, they have probative value as exhibits in plaintiffs' complaint. Appellees, they say, are corporate entities not present in Texas. A holding that the appeal is interlocutory would relieve appellees from ever being forced to answer and explain what Standard and Cities Service have been doing in Texas through their agents, adjuncts, and instrumentalities—Canadian, Colorado, Naural, and Southwestern. Wouldn't they naturally stay out of Texas from then on, making the judgment final?

"Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading."
*Rule 8(d)*

"Except when otherwise specifically provided by rule or statute, pleadings need not be verified

or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished."

*Rule 11.*

By virtue of Rule 10(c) Rule 11 applies to exhibits as well as to averments appearing in the complaint.

(19) When the Court sustained what Standard said in its brief on page 6:

> "A motion to dismiss a complaint for failure to state a claim upon which relief could be granted would, of course, admit all facts well pleaded. But this appellee has filed no such motion. Its motion to quash admits nothing. It was a special appearance."

It is evident from Rule 12(b) that Standard and the District Court erred greatly in holding that there is a vast difference between a motion to dismiss and a motion to quash.

It is also evident from the language of Rule 12(b) that it was the intent of the writers of that rule that it was to cover all rules irrespective of their designation, however rarely used and however slim the difference may be between them.

> "All defenses or objections are presented by motion or pleading. All distinctions, many of them tenuous, between demurrers, motions, exceptions for insufficiency, and pleas are avoided. *Special appearances to challenge jurisdiction over the person* or *improper venue are not necessary.*"
>
> *Moore's Fed. Practice*, 1947 Supp., Vol. 1, p. 255.
>
> "*Every* defense, in *law*, or fact, to a claim for relief * * * shall be asserted in the responsive

pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over subject matter, (2) lack of jurisdicdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted * * *."

*Rule 12(b).*

"Special appearance to challenge jurisdiction over person or improper venue are not necessary."

*Moore's Fed. Prac.*, Vol. 1, 627.

"The Rules make no distinction between general and special appearances."

*Moore's Fed. Prac.*, Vol. 1, 373.

"Special appearances are no longer necessary in any case."

*Moore's Fed. Prac.*, Vol. 1, 549.

"A motion to dismiss properly raises the question of lack of jurisdiction of the person. Massachusetts Farmers Defense Comm. vs. United States (D. Mass), 26 Fed. Supp. 941."

*Moore's Fed. Prac.*, Vol. 1. 1947 Cum. Supp. 257.

"Mr. Abbott, in his dictionary, defines 'quash' to mean to annul, overthrow, vacate by judicial acts. Hood v. French, 19 So. 165, 167, 37 Fla. 117."

*Words & Phrases*, Vol. 35, Per. Ed., 619.

Thus a motion to quash is included in the motion to dismiss under the New District Court Rules. They are the same, except that the motion to dismiss includes other motions besides the motion to quash.

(20) When the Court sustained "Natural's motion to quash the purported service of process on it" and "sustained Natural's person, and for want of proper venue" (page 20 in Natural's brief) because (first see plaintiff's,

Natural's First Amended Original Petition, Exhibit F, case of Natural Gas Pipeline Company vs. Colorado Interstate Gas Company and Canadian River Gas Company in the District Court of Potter County, Texas, Tr. R. 8 -120.) Natural says that Canadian is a mere titleholder of the property standing in its name, Colorado and Natural being the true owners and beneficiaries of the trust. A few excerpts from plaintiff's (Natural's) First Amended Original Petition are here quoted:

> "By reason of the contracts, facts and circumstances hereinafter alleged, Colorado and plaintiff (Natural) are the beneficial owners of the natural gas reserves in place, the legal title to which is vested in Canadian, and the status of Canadian in *fact* and in *equity* is that of an *operating agent* or *department* of *Colorado* and a *trustee holding* the *legal title to said reserves* for the *benefit* of Colorado and plaintiff." Tr. R. 89.

> "Under this contract Canadian is a mere agency and in legal effect a mere department of Colorado through which Colorado holds title to the properties standing in the name of Canadian; and by virtue of said contract Colorado became the actual equitable owner of the natural gas reserves of Canadian etc. and the gathering lines, compressor station, gas wells, and other facilities standing in the name of Canadian, etc.

> * * * *

> In form Canadian and Colorado are separate corporate entities owning individual properties, but in *substance* and in *fact*, Canadian is a *mere department or instrumentality by which Colorado owns, controls and operates all of the gas reserves and properties of* Canadian as an integral part of the natural gas transportation system of Colorado." Tr. R. 92.

***This Honorable Court need go only one step farther to hold that Standard and Cities Service are the true owners and operators, with appellees and Canadian being merely their departments.***

Assuming that Natural, Canadian and Colorado are corporate entities, by what authority has Natural the right now to say that it has never and is not now doing business in Texas?

A number of other similar statements of Natural are to be found in its petition in the state court. (See Exhibit F—Tr. R. 86-120). Assume that Canadian and Natural and Colorado are corporate entities, which they are not; said petition of Natural clearly admits that Natural and Colorado are the true owners of the natural gas leases, property and equipment and also are the true operators in Texas, carrying on the production, transportation, and sale of natural gas, with E. C. Wagner and Canadian being the agents and Canadian, in addition thereto being a department of Colorado and Natural, as Natural states on page 92 in its petition, pages 400-410 of the Transcript of Record.

Standard and Cities Service are the true lessees and owners of the natural gas properties in Texas standing in the name of Canadian. E. C. Wagner was and is their agent. A short account of the facts as to that statement is to be found in appellants' motion for rehearing, pages 1 to 15, or under the paging in the Transcript of Record, pages 386 to 400.

The fact, however, is that Colorado, Natural, Canadian, and Southwestern are all three departments, agents, adjuncts, alter egos of Standard and Cities Service. That makes Standard and Cities Service plaintiff's lessees with E. C. Wagner their agent and Natural, Colorado, Canadian and Southwestern adjuncts, instrumentalities of Standard

and Cities Service. Consequently, by the United States Marshal serving a summons and complaint upon E. C. Wagner, that is, a summons and complaint for each one of the six, the court acquired jurisdiction over Standard and Cities Service. The other four not being corporate entities, service of summons and complaint on them is mere surplusage. Being mere departments, property standing in their names is within the jurisdiction of the United States Court.

On pages 12, 15 of the petition for writ of certiorari there is to be found a statement that the Canadian and Colorado have been operated as a single unit since 1928. It is also stated that the two companies have practically the same directors and officers and that practically all the officers and directors of the Canadian were recruited from the staff of the Standard Oil Company.

Where a corporation does business within a state without filing the required consent, service made upon its agents will sustain a judgment against it. *R. R. vs. Harris*, 12 Wall. U.S. 65; *International Harvester Co. vs. Ky.*, 234 U.S. 579; *Harvard Law Review*, Vol. 30, 676.

(21) When the Court sustained the Southwestern Development Company's motion to quash and dismiss plaintiffs' suit against Southwestern, for the same reasons given by plaintiffs showing reversible errors of the District Court and the Court of Appeals as to the other appellees' making said reasons a part hereof as though fully set forth herein.

## V.

## SUMMARY STATEMENT OF MATTER INVOLVED

In the interest of brevity the summary is not repeated at this point but only referred to as follows:—

1. General Subject of Litigation, pp. 7, 8. in Petition for Certiorari.

2. Facts Involved in the Appeal, pp. 8, 9 of the Petition.

3. Facts in the Briefs of the Government's Attorneys in the Case of Colorado Interstate Gas Company vs. Federal Power Commission, 142 F. 2d, 943, and in the Same Case in the Supreme Court of the United States, 324 U.S. 581, 89 L. Ed., 807-902, pp. 12 to 17 in the Petition.

4. Appellants' Motion for Rehearing, pp. 386 to 427 in the Transcript of Record.

## VI.

## ARGUMENT

*The District Court Deprived Plaintiffs of Their Constitutional Right under the Fifth Amendment of the United States Constitution to be Heard before Judgment Was Entered Against Them.*

The facts, as to this constitutional question are contained in the Affidavit of Mabel A. Bartelt and in five or six letters and are to be found on pages 339 to and including page 349 in the Transcript of Record.

In the case of *Hovy v. Elliott*, 167 U.S. 418, the Court approved the definition of "due process of law" as given by Daniel Webster in the Dartmouth College case, 17 U.S. 4 Wheat 518, "By the law of the land (which Webster said was equivalent to 'due process of law') is most clearly intended the general law, *a law which hears before it condemns*, which proceeds on inquiry, and renders judgment only after trial."

> "Due process requires that the court which assumes to determine the rights of parties shall have jurisdiction (Pennoyer v. Neff, 95 U.S. 714; Scott v. McNeal, 154 U.S. 34, Old Wayne Mut. Life Assoc. v. McDonough, 204 U.S. 8) and that there shall be notice and *opportunity* for *hearing* given the parties, Roller v. Holly, 176 U.S. 373, subject to these two fundamental conditions, which seem to be universally prescribed in all systems of law established by civilized countries, this court has, up to this time, sustained all state laws, statutory or judicially declared, regulating procedure, evidence, and methods of trial, and held them to be consistent with due process of law. * * *
>
> The cases proceed upon the theory that, given a court of justice which has jurisdiction, and acts, not arbitrarily, but in conformity, with a general

law, upon evidence, and after inquiry made with notice to the parties affected and *opportunity to be heard*, then all the requirements of due process, so far as it relates to procedure in court and methods of trial and character and effect of evidence, are complied with." (Here follow quotations from various cases to this effect).

*Twining v. New Jersey*, 211 U.S. 78, 29 Sup. Ct. 14, 53 L. Ed. 97.

"The right to a fair and adequate hearing in which one has the right to defend his interests before an impartial court is essential to due process of law."

16 *C.J.S.* 1265.

* * * *

"Due process of law requires an orderly proceeding adapted to the nature of the case, in which proceeding the citizen has a right and an *opportunity to be heard* and to *defend, protect,* and *enforce* his rights, by establishing any fact which, under the law, would be a protection to him or to his property, and resultant action in conformity with the facts developed."

16 *C.J.S.* 1265.

* * * *

"It is a principle that lies at the foundation of all jurisprudence in civilized countries that a person must have an opportunity of being heard before a court can deprive such person of his rights. This rule is applicable to all proceedings, whether common law, chancery, or statutory, and no court has power to divest a person of a vested right until he is made a party to a suit and has had a reasonable opportunity of being heard in defense of his rights."

*Leininger v. Rechle*, 317 Ill., 625, 148 N.E. 384.

16 *C.J.S.* 1266 footnote.

* * * *

> "The right to a fair and adequate hearing in which one has the right to defend his interests before an impartial court is *essential* to due process of law."
>
> 16 *C.J.S.* 1265.

Mr. Bartelt was still in Philadelphia trying a case when he received a letter from his wife enclosing one from Adkins, Pipkin, Madden & Adkins saying that they had been "reliably advised" that the motions in the Dunaway case would come up for hearing March 14, 1949. He instructed his wife to write the judge that the week following March 14 would be satisfactory to him if it would be to the judge and other attorneys. Mrs. Bartelt communicated this to the clerk of the District Court at Fort Worth, Texas, on March 5, 1949. Tr. R. 344, 345. This is what she said in her letter:

* * *

> "However, he says that the week following March 14 would be satisfactory to him if it would be to the judge and other attorneys."
>
> Letter of Mabel A. Bartelt dated March 5, 1949, Ex. 4, Tr. R. 344, 345.

Mr. Bartelt's request that the hearings be adjourned for a week was denied. There is nothing in the record showing that a week's adjournment would have prejudiced defendant's case.

It is a common courtesy among lawyers, where an adjournment does not harm a client's case, to agree to an extension. This refusal to accommodate plaintiffs' attorney by agreeing to an extension which Judge Wilson had said he would grant if defendants' attorneys were willing (Judge Wilson's letter of March 7 to Mrs. Bartelt, Tr. R. 348) has most likely retarded rather than expedited

the trial of this case on its merits. The nine big law firms in New York, Chicago, Amarillo, Fort Worth and Houston, representing the defendant oil companies all have large office staffs to do their work while counsel for plaintiffs has no partners or other office help except his wife.

Counsel for plaintiffs never received an official notice from the Court of the March 14 setting. His only notice came in the form of a letter from Adkins, Pipkin, Madden & Adkins of Amarillo, attorneys for one of the defendant oil companies, saying that they had been "reliably advised" that "Judge Wilson would hear the motions in the above cited case on March 14." Tr. R. 341.

## DEFENDANTS' TAKING NATURAL GAS IN EXCESS BY UNLAWFUL DRAINAGE, AS SHOWN IN PLAINTIFFS' BRIEF, IMPRESSES SUCH EXCESS WITH A CONSTRUCTIVE TRUST WHEN IT ENTERS DEFENDANTS' PIPELINES AND TANKS, WITH PLAINTIFFS AS THE CESTUI AND DEFENDANTS AS TRUSTEES.

The complaint shows that the alleged Canadian had leased practically all the acreage surrounding plaintiffs' land. By virtue of plaintiffs' lease, with the Canadian as lessee, if it was a corporate entity, the latter assumed the duty of protecting plaintiffs' land from drainage. The complaint further shows that the Canadian was taking from six to sixteen times more natural gas from the adjoining leases than from those of plaintiffs. Thus lessee was taking natural gas from underneath plaintiffs' land which lessee did not own. Thereby the latter converted to its own use some natural gas in excess of the royalty allowance in favor of lessee. This constituted a tortuous unlawful taking of

plaintiffs' natural gas. What actually happened was this—the lessee unlawfully took natural gas which did not belong to it and transported it through its pipelines and tanks until taken over by the consumers. This constituted unlawful taking of plaintiffs' property by lessee.

A. W. Walker, Jr., formerly a professor in the University of Texas, teaching oil and gas law in which subject he is a highly recognized authority, in his article entitled "Important Oil & Gas Decisions" in the Texas Bar Journal, pages 479 and 501, says:

> "It does not seem objectionable in such a case to say, as was said by the Court, (Eliff vs. Texon Drilling Co., 210 S. W. 2d 558) that the oil or gas still belonged to the owner of the land from which it had been improperly drained, and that the defendant should be held liable as a converter."

## THE LIABILITY CREATED BY THE DEFENDANTS IN THEMSELVES BY SAID CONTINUING TORT IS NOT JOINT BUT SEVERAL AND JOINT.

> "All persons who join in the commission of a wrong resulting in injury are *jointly* and *severally* liable for the entire damage sustained without regard to the degree of culpability of each. The injured party may elect to sue joint tortfeasors jointly or severally, and while a several judgment unsatisfied is ordinarily no bar to the subsequent action against other tortfeasors, only one satisfaction of the claim may be obtained." 62 *C.J.* 1131.
>
> "But the fact that a joint tort has been committed does not require that all of the joint tortfeasors shall be joined as defendants, as in the case of the obligors to a joint contract; for it is a well

> settled common-law rule that, where an injury is caused by the tortuous act or acts of two or more persons, each contributing thereto as a joint tortfeasor, *their liability therefor is regarded as both joint and several, and plaintiff may, at his election, sue any one of the several joint wrongdoers separately,* or he may sue any number or all of them jointly, although there may exist a difference in the degree of the misconduct or liability, or the amount of evidence necessary to establish the liability of each. This rule applies, although the several persons act independently, if their wrongful acts concur in causing the injury;" 47 *C.J.*, 70, citing Sessions vs. Johnson, 95 U. S. 347.

## COURT OF APPEALS SAID IT DISMISSED PLAINTIFFS' ACTION "UPON OUR CASE, HUNTEMAN V. NEW ORLEANS PUBLIC SERVICE, INC. 119 F. (2) 465." WHOSE CONTROLLING FACTOR BEARS NO RELATION TO THAT OF THE CASE AT BAR AS EVIDENCED BY PLAINTIFF'S COMPLAINT.

Plaintiff finds no fault with the Hunteman decision but with its application to the facts of their case which are so obviously different. In the Hunteman case the plaintiff alleged in his complaint

> "that the injury resulted from their *joint* and *concurrent* negligence and asked judgment in solido against them. (New Orleans Public Service Inc., Arthur J. Rife and the Liberty Insurance Co.) The court below granted the motion of the New Orleans Public Service, Inc., to dismiss the suit, as against it, on the ground that the complaint failed to state a claim upon which relief could be granted. This appeal was taken from that judgment of dis-

> missal, and is met in this court with a motion to dismiss on the ground that the judgment appealed from lacks the finality necessary to confer jurisdiction upon the court, since the action against the other defendants was not disposed of by the judgment but is still awaiting trial in the court below."

There was no dispute on the deciding fact in that case, that the liability was joint and not joint and several, and was so admitted by the plaintiff. In this type of appeal the deciding issue is whether or not the liability is joint or joint and several. The liability in the case at bar is manifestly joint and several and therefore the Court of Appeals erred in basing its decision on the Hunteman case.

Plaintiffs' complaint charges that the unlawful excess drainage of the gas by offsetting wells on adjoining leases allegedly owned by Canadian varied from six to sixteen times more than was allowable and that most of it was transported by defendants interstate, even as far as Chicago where it was sold and the money kept by the defendants, a tortuous act carrying a joint and several liability. That unlawful taking of plaintiffs' natural gas impressed whatever gas so taken with a constructive trust. Tr. R. 9. In connection with said unlawful taking of plaintiffs' gas there was a violation of the anti-trust laws of the United States, violations of both the Sherman and the Clayton Acts by two or more parties acting together creating joint and several liabilities. Furthermore, plaintiffs, in their Wherefore Clause, pray as follows:— "that judgment be awarded in favor of plaintiffs against each of the de-

fendants, individually and jointly, for thrice the amount of such damages and for costs and reasonable attorneys' fees."

Furthermore, the issue in this appeal is a collateral matter wholly between plaintiffs and appellees. That is, it is entirely separate and distinct from the subject of litigation. There is no piecemeal settlement of a claim. This is a suit for damages but there is nothing involved in this appeal on that question. *Rosenberg Bros. v. Curtis Brown Co.*, 160 U. S. 516, 67 L. Ed. 372, Mr. Justice Brandeis; *Thompson vs. Murphy et al.*, 93 Fed. 2d 38, 40 C. C. A., 8th Circuit, Mr. Justice Sanborn.

## THE LIABILITY IN PLAINTIFFS' CASE IS NOT JOINT BUT JOINT AND SEVERAL.

> "The liability of conspirators is joint and several." 11 *American Jur.* 578.
>
> "Conspirators are jointly and severally liable for all damages resulting from the conspiracy, each being responsible for the acts of the other in furthering the common design." 15 *C.J.S.* 1028.
>
> "All those who were parties to the illegal conspiracy or combination and those in privity may (may, not must) be joined as parties defendant to the action, or the personal representatives of those who are deceased. Moreover, in order to be entitled to recover, it need not sue the member of the combination making the sale, but may sue any other member or members thereof that it chooses, each of the members of such combination being responsible for the torts committed pursuant thereto." *Fletcher Cyc. Cor. Perm. Ed.*, Vol. 10, page 961, citing Atlanta v. Chattanooga Foundry & Pipeworks, 127 F. 23, 64 L.R.A., 721.

"Tort feasors are not necessary or indispensable to an action against one of their numbers, because their liability is both joint and several" *Moore's Fed. Pract.*, Vol. 2, p. 2146.

"Since the liability of conspirators, as stated supra, Section 18, is *joint* and *several*, the action may be maintained against *one only* of the conspirators, or plaintiff may at his option join all the alleged conspirators as defendants in one action. Plaintiff may look beyond the actual participants in committing the injury and join with them as defendants, all who cooperated in or advised or assisted in the accomplishment of the common design, although neither present nor participating. 15 *C.J.S.* 1034.

"All conspirators may be joined as parties defendant in an action for the damages caused by their wrongful act, although it is not necessary that all be joined, an action may be maintained against only one." 11 *Amer. Jur.* 585.

"In other words the Clayton Act . . . The one complaining *need not see the person to whom he paid the illegal prices. He may recover from any member of the conspiracy,* if he shows that the direct effect is to injure him in his business or property and produces facts from which such injury may be ascertained." *Northwestern Oil Co.*, C. C. A. Wis. 138 Fed. (2) 96, Cer. denied. 321 U. S. 792.

"In an action on the case in the nature of a conspiracy to recover damages, it is permissible to sue one only, as the damage and not the conspiracy itself is the gist of the action; or plaintiff may at his option join all of the alleged conspirators as defendants in one action. Plaintiff may look beyond the actual participants in committing the injury and point with them as defendants all who cooperated in or advised or assisted in the ac-

complishment of the common design. In an action for fraudulent conversion of property pursuant to a conspiracy a person in whom title to some of the property was placed was properly made a defendant, although no charge of collusion or fraud was made as to him, under a statute providing that any person may be made a defendant who has or claims any interest adverse to plaintiff." 12 *C.J.* 613 citing U. S. v. Wupperman, 215 Fed. 135; Motley v. Detroit Steel, etc. Co., 161 Fed. 389; Smith v. Rines, 22 F. Case No. 13,100.

"Thus, where several of a number of joint tort feasors are not subject to the jurisdiction of the court, the action may nevertheless proceed against the other tortfeasors, as the non-resident defendants are not indispensable parties, and the action will not be dismissed. Wyogo Gas & Oil Corp. v. Schrack (M. D. Pa. 1939) 27 F. Supp. 35, aff'd on re-argument 29 Fed. Supp. 582." *Moore's Fed. Prac., Cum. Supp.*, p. 45, Vol. 2.

Neither the Court of Appeals nor the defendants cited any authorities proving that the liability pleaded in plaintiffs' complaint was joint rather than joint and several They just took it for granted that the liability was joint, that is, they simply ignored all the averments in plaintiffs' complaint.

A CORPORATION CAN BE A CONSPIRATOR.

"A corporation may be a conspirator. *Potter Press v. C. W. Potter, Inc.*, 303 Mass. 485, 22 N.E. (2d) 68; 10 *Fletcher on Corp. Perm. Ed., Cum. Supp.*, p. 48.

"It is very clear that a corporation can be guilty of a conspiracy with other corporations or persons aimed at and accomplishing the injury of other corporations or persons." 10 *Fletcher on Corp. Perm. Ed.* p. 374 citing Buffalo Lubricating Co. v. Acme Oil Co. 106 N. Y. 669, 129 N. E. 825.

"Officers or agents who actually perpetrate the tort may be jointly and severally liable with the corporation which they represent." 10 *Fletcher on Corp. Perm. Ed.* p. 457.

"The law today is well settled that there is nothing inherent in the nature of a private corporation, which precludes it from being guilty of a tort and being held liable therefor precisely as in the case of natural persons." 10 *Fletcher on Corp., Perm. Ed.*, p. 334.

THE COURT OF APPEALS SAID IN ITS OPINION "WE CANNOT AGREE WITH APPELLANTS. WE THINK IT TOO CLEAR FOR ARGUMENT THAT THE AUTHORITIES APPELLEES CITE ARE CONTROLLING HERE. THE ACTION BROUGHT IS ONE AGAINST SIX DEFENDANTS FOR THE CONSEQUENCES OF THEIR JOINT AND CONCURRENT ACTION."

According to the foregoing, in order that a joint liability can be created or considered to exist there needs to be only one element—joint and concurrent action of two or more parties working for the same objective regardless of what that may be. The Court's statement contains no limitations. One very essential element is omitted, namely, that the working together of two or more parties must not result in a fraud or tort or crime or injury to third parties. Thus the foregoing statement of the Court of Appeals is directly in conflict with the universally recognized authorities just cited on the preceding page. Plaintiff's complaint sets out facts showing that defendants

have unlawfully taken plaintiff's natural gas for years and transported it to other states, sold it, and kept the money, have violated the federal anti-trust laws and Standard and Cities Service have transacted business for years in Texas without a license. Is it not clear that the Court of Appeals has failed to take into consideration the controlling facts and applicable law that should have compelled them to reverse the five orders of the District Court? In fact, appellants believe that it "is too clear for argument" that their authorities instead of those of appellees should have controlled in the Court of Appeals.

## THE COURT OF APPEALS SAYS "THE AUTHORITIES APPELLEES CITE ARE CONTROLLING HERE" AND THEN LISTS THESE CASES IN THE FOOTNOTE, TR. R. 383, BUT ALL THE CASES CITED ARE TO THE EFFECT THAT ONLY IF THE LIABILITY INVOLVED IS JOINT AND NOT JOINT AND SEVERAL MAY THE ORDER OR JUDGMENT BE INTERLOCUTORY.

The Court of Appeals has listed in its footnote in its opinion a number of authorities cited by the appellees which it says are controlling in this action. However, a reading of those cases reveals that in each case the liability was joint and not joint and several and on that fact the courts in each case decided that the judgment or order was interlocutory. Neither the appellees in their briefs nor the District Court nor the Court of Appeals in its opinion have cited a single case to the effect that an interlocutory judgment or order has for its basis a joint and

several liability. Consequently none of these cases apply and therefore all that this Honorable Supreme Court can do is to reverse each one of these five orders or judgments of the Court of Appeals.

In all the cases listed by the Court of Appeals in their opinion and which have just been recited the parties are charged with joint liabilities but one or more who are jointly liable were not made parties. Because of this omission the orders and judgment were not final but interlocutory.

In *Kuhn et al v. Canteen Food Serv. Ice Co. Inc., et al,* 9th Circuit, 150 Fed. 2d, 55 (1945) the Court said:

> "Where all the parties are charged *jointly* and the cause remains pending as to some the case is not final. Hohorst v. Hamburg-American Packet Co., 148 U. S. 262, 37 L. Ed. 443; Hunteman v. New Orleans Public Service, 5 Cir. 119 Fed. 465; Atwater v. North American Coal Corp., 111 F. 2d 125; Hunter v. Federal Insurance Co., 8 Cir. 103 F. 2d 192; Southland Industries v. Federal Communications System, 69 App. D. C. 82, 99 Fed. 2d, 117; Fields v. Mutual Benefit Life Ins. Co. 4 Cir., 93 F. 2d 559; Lockhart v. New York Life Ins. Co. 4 Cir. 2d 684."

---

Footnote in Opinion of Court of Appeals:

Kuhn, et al v. Canteen Food Serv., et al, 150 F(2) 55;
Hohorst v. Hamburg-Am. Packing Co., 148 U. S. 262;
Atwater v. N. A. Coal Co., 11 F(2) 124;
Hunter v. Fed. Life Ins. Co., 103 F(2) 192;
Southland Ind. v. Fed. Communications System, 99 Fed. (2) 117;
Fields v. Mut. Ben. Life Ins. Co., 93 F(2) 559;
Lockhart v. N. Y. Life Ins. Co., 71 F(2) 684;
Photometric Pro. Corp. v. Radtke, 157 F(2) 849;
U. S. v. Braunstein, 168 F(2) 749;
Western Contracting Co. v. National Sur. Corp., 163 F(2) 456.

It will be noticed that all but the last three are not only listed in this case but are cited in order that they appear in the opinion of the Court of Appeals. Those last three were decided after the Kuhn case.

*Photometric Products Corporation vs. Radtke et al,* 157 F. 2d, 849, (1949):

> "An appeal will not lie when divers defendants are sued for wrongs *jointly* committed until the suit is decided against all the defendants."

*United States v. Braustein,* 168 F. 2d, 749:

> SYLLABUS:—"Where first count was against three or four defendants as *joint venturers* for breach of contract, second count was against one of such defendants for breach, and third count against remaining defendant for breach of warranty of authority to enter into contract, judgment dismissing complaint on motion by defendant in second count was not an appealable 'final judgment', since it did not dispose of claims against other defendants.
>
> "Where appeal was dismissed because judgment appealed from was not final in that it did not dispose of claims against all defendants, cause should proceed either by determination of issues against all defendants or by discontinuance of suit made against those defendants whose liability had not been determined. Fed. Rules of Procedure, Rule 41(a) U.S.C.A. following Section 723."

*Western Contracting Corporation, et al v. National Surety Corp.,* 163 F. 2d, 456:

> "Western Contracting Company, acting together as joint venturers under the name of Myers-Western, entered into a contract with the United States for the construction of an airport at Parkersburg, W. Va. They then made sub-contracts with

one Hadbad to do the drainage work required by the principal contract. Hadbad gave a performance bond and a payment bond, with the National Surety Co. on both, for the faithful performance of his obligations under the subcontract and the payment of claims for labor and materials.

This action was instituted by sub-contractor Hadbad to recover damages of Myers-Western for alleged breach of contract. Myers-Western filed denying that they had broken the contract and alleged Hadbad had violated his contract. The surety company was brought into the suit."

* * *

SYLLABUS:—"And adjudication that Surety was discharged from liability under performance bond given by subcontractors to subcontractor, without first determination, whether contractor was liable to contractor, was not a 'final judgment' from which an appeal would lie on ground that it constituted a declaratory judgment."

Here again the facts show that the parties were acting together as "joint venturers". It pertained to one undertaking, the construction of an airport for the United States Government. A part of the difficulties and differences between certain parties involved a joint claim. A part between two of the parties was settled by litigation, that is, the Surety was discharged from liability. This was done without first determining whether one contractor was liable to the other. Thus an appeal could not lie.

The foregoing cases clearly show that where the question of finality of judgment depends upon the question of liability then the question of finality of a judgment depends upon whether the claim is joint or joint and several. Neither the appellees nor the Court of Appeals has presented any authorities or any argument attempting to prove that in the case at bar the liability is purely joint. The Court of Appeals states that the appellants claimed that defenders were conspirators in violation of the anti-

trust law. The Court does not state directly that that constitutes a joint liability, that is, as to the damages resulting from such conspiracy. Thus there is nothing more than a bald assumption by the Court of Appeals that such conspiracy created a joint liability. Not one of the cases cited by the Court and upon which it based its dismissal, is joint and several and therefore they have no application in the case at bar.

## THE COURT OF APPEALS SAYS, TR. R. 383, "THE ORDERS ARE INTERLOCUTORY AND, THEREFORE, SUBJECT TO BE SET ASIDE OR MODIFIED AT ANY TIME UNTIL THE *WHOLE CAUSE IS DISPOSED OF*," THUS ERRONEOUSLY IMPLYING THAT IF THE SUPREME COURT TAKES JURISDICTION AND RENDERS A JUDGMENT A *PART* OF THE *CAUSE* HAS BEEN DISPOSED OF.

The Supreme and Appellate Courts have plenty to do without taking on a cause of action piece by piece. Appellate courts continuously make the statement that the court cannot try a case by segments and do justice to it. In the above quotation from the Court of Appeals there is the following expression—"until the whole cause is disposed of." That implies that plaintiffs' part of their suit for damages wil be disposed of. Just how can any part of the merits of the case be settled and disposed of by a mere question of jurisdiction? Just where can it be pointed out that a part of the "whole cause" can be "disposed of" in this appeal when it is not even mentioned? Just what legal interest, assuming that it is a corporate entity, does the Canadian have in the jurisdictional issue as to whether Colorado, Southwestern, Standard, Cities Service and Natural have been lawfully served with summons and complaint? A necessary portion of the claim, even though small, is missing in appellees' defense.

## A DECISION WHICH COMPLETELY DETERMINES A COLLATERAL MATTER DISTINCT FROM THE GENERAL SUBJECT OF LITIGATION AND FINALLY SETTLES THAT CONTROVERSY IS APPEALABLE.

Circuit Court Justice Sanborn of the 8th Circuit, in the case of *Thompson vs. Murphy, et al,* 93 F. 2d, 38, 40, very clearly points out the three different situations which may occur as to the appealability of orders and judgments, as follows:—

First Situation:—

> "An order, judgment, or decree which leaves the rights of the parties to the suit affected by it undetermined—one which does not substantially and completely determine the rights of the parties affected by it in that suit—is not reviewable here until a final decision is rendered, nor is an order retaining or dismissing parties defendant, who are charged to be jointly liable to the complaint in the suit, appealable. U. S. vs. Girault, 11 How. 22, 32, 13 L. Ed. 587; Hohorst v. Packet Co., 148 U. S. 262, 263, 13 S. Ct. 590, 37 L. Ed. 443."

Second Situation:—

> "But a final decision which completely determines the rights, in the suit in which it is rendered, of some of the parties who are not claimed to be *jointly liable with those against whom the suit is retained,*"

Third Situation:—

> "and a final decision which completely determines a *collateral matter distinct* from the *general subject of litigation,* and *finally settles that controversy, is subject to review in this court by appeal or writ of error.*"

The case at bar at least clearly comes within the third classification because the issue before this Court is purely a question of jurisdiction.

Mr. Justice Brandeis delivered the opinion of the Court in the case of *Rosenberg Bros. & Company, Inc., vs. Curtis Brown Co.*, 160 U. S. 516, 67 L. Ed. 372:

> "Rosenberg Brothers & Company, Incorporated, a New York Corporation, brought this suit in the supreme court of that state against Curtis Brown Company, an Oklahoma corporation. The only service of process made was by delivery of a summons to defendant's president while he was temporarily in New York. Defendant appeared specially; moved to quash the summons on the ground that the corporation was not found within the state; and, after evidence was taken, but before hearing on the motion, removed the case to the Federal court for the western district of New York. There, the motion to quash was granted, upon the ground that the defendant was not amenable to the process of the state court at the time of the service of the summons. A writ of error was sued out under Section 238 of the Judicial Code; and the question of jurisdiction was duly certified. The order entered below, although in form of an order to quash the summons, and not a dismissal of the suit, is a final judgment; and the case is properly here. Godley v. Morning News, 156 U. S. 518, 39 L. Ed. 517, 15 Sup. Ct. Rep. 559; Cowley v. Mathieson Alkali Works, 190 U. S. 406, 51 L. Ed. 1113, 23 Sup. Ct. Rep. 308."

The case at bar is a duplication of the foregoing on the question of finality of order or judgment.

## MEMORANDUM OF STIPULATIONS NOT VOIDABLE BUT VOID.

The objective of the making of the Memorandum of Stipulations was to create a monopoly in the ownership of the natural gas business—owning the gas in the ground, producing, transporting, and selling it to the consumer, the creating of corporation subsidiaries, writing their contracts for them, thus controlling them in their production, fixing prices, placing restraint upon interstate commerce, forming a monopoly, preventing competition, pooling interests and violating the anti-trust law. Thus the Memorandum of Stipulations was not voidable but void. It never had any existence. It was a contract that could not have life breathed into by stipulation, time, or a court.

> "Any contract or agreement in violation of the provisions of the anti-trust statutes of this state is absolutely void and unenforcable in the court of this state. Henderson Tire & Rubber Co. v. Roberts, (Com. App.) 12 S. W. (2d) 154, affirming 1 S. W. (2d) 510.
>
> "Illegal contracts generally, see Contracts, Vol. 10, p. 193." 20 *Tex. Jur.* 771.
>
> "In addition to usurious, gaming and wagering and smuggling contracts, it is also a general rule that every contract or agreement is void and illegal when its object is to promote a violation of a statute or constitutional provision." *Pomeroy's Equity Jurisprudence*, Fifth Ed., Vol. 3, p. 651.
>
> "When the performance of a contract otherwise legal will involve the violation of the terms of a statute or of positive rule of law, it is not enforcible and cannot be ratified nor its terms made binding by ratification, waiver, or otherwise. Rue v. Missouri Pac. Ry. Co., 8 S.W. 553, 74 Tex. 474, 15 Am. St. Rep. 852; Raywood Rice C. & M. Co. v. Erp, 146 S.W. 155, 105 Tex. 161; Chimene v. Pennington, 79 S.W. 63." *Ferguson v. Mounts*, 281 S.W. 616, 621.

ONE VOID CONSIDERATION MAKES ENTIRE CONTRACT VOID.

"The illegal and legal consideration (if there be any legal ones) are inextricably mingled, and the papers (or other facts) do not furnish means whereby the unlawful considerations may be exclusively apportioned to the improper obligations so as to leave a valid obligation, complete in itself, supported by an independent, valid consideration (if any there be). This portion of paragraph 4, its results, is within the general rule:

"That a promise made upon several considerations, one of which is unlawful, no matter whether the illegality, be at common law or by statute, is void.' Edwards County v. Jennings, 89 Texas, 618, 35 S.W. 1053, 1054. and authorities cited; Wagner Bros. v. Biernight, 65 Tex. 506, 13 S.W. 357; Reed v. Brewer, 90 Texas 144, 57 S. W. 418." Raleigh Co. v. Land, 279 S. W. 810, 813 (Tex. Com. App.).

"If any part of the consideration in a contract is illegal, if not severable, the whole consideration is void. It matters not whether it is illegal because it consists in some act prohibited by statute or condemned by the common law." Prudential Life Ins. Co. v. Pearson, 188 S.W. 513, 515 (Tex. Civ. App.).

A CONTRACT GROWING OUT OF OR CONNECTED WITH A PRIOR ILLEGAL CONTRACT — THE ILLEGALITY OF THE LATTER ENTERS INTO THE NEW CONTRACT AND RENDERS IT ILLEGAL.

"Where a contract grows immediately out of and is connected with a prior illegal contract, the illegality of such prior contract will enter in to the new and render it illegal, and the rule has been broadly stated that if the connection between the original illegal contract can be traced and if the latter is connected with and grows out of the former,

no matter how many times and in how many different forms it may be renewed, it cannot form the basis of recovery. 13 C. J. 509, Sec. 460, Armstrong v. Toler, 11 Wheat, 258, 6 L. Ed. 468; Tomkins v. Seattle Const. & Dry Dock Co. 96 Wash. 511, 165 p. 384." *Horbach v. Coyle*, 2 F. (2d) 707 (C.C.A.) 8.

The foregoing *Horbach v. Coyle*, supra, is quoted in the case of Oldham v. Briley, 117 S.W. (2d) 197, 809. (Tex. Civ. App.)

Quoting from the case of *Shelton v. Marshall*, 16 Tex. 344, 363, the Court in the Oldham v. Briley Case, said:

> "It is well settled that when an original contract is illegal, any subsequent contract, which carries into effect, is also illegal."
>
> "Where a contract grows immediately out of, and is connected with a prior illegal contract, the illegality of such prior contract will enter into the new contract and render it illegal. * * * So every new agreement in furtherance of, or for the purpose of carrying into effect, any of the unexecuted provisions of a previous illegal agreement is likewise illegal and void, and is a contract the performance of which depends on performance of a prior invalid contract."
>
> 17 *C.J.S.* 672.

## DIRECTORS, STOCKHOLDERS, AND EVEN COURTS ARE POWERLESS TO BREATHE LIFE AND VALIDITY INTO A VOID CONTRACT.

> "It is an established principle that confirmation may make good a voidable or defeasible estate, but cannot operate upon or aid an estate which is void in law. 1 Devlin on Real Estate (3d Ed.) Sec. 18 p. 30; 14 Tex. Jur., Sec. 23, p. 776; Breitling v. Chester, 88 Tex. 586, 32 S.W. 527, 529; Mont-

gomery v. Horenberger, 16 Tex. Civ. App. 28, 40 S.W. 629, 1 Warvelle on Vendor's, Sec. 388, p. 402." *Clark v. Humble Oil & Refg. Co.*, 57 S.W. (2d) 597, 602, reversed on other grounds, 87 S.W. (2d), 471.

"If this contract is illegal and against public policy, there is no power which can breathe life or validity into it, and the ratification attempted to be made by the City Commission would be void. 19 R.C.L., Sec. 196; 13 C.J. 506." *Meyers v. Walker*, 276 S.W. 305, 307. (Tex. Civ. App.).

"The question is not one involving want of authority to contract on account of irregularity of organization or lack of affirmative grant of power in the charter of a corporation, but a question of absolute want of power to do that which is inhibited by statute, and, if attempted, is in positive terms declared 'utterly null and void.'

" 'The rule of law,' said Parker, C. J. in Russell v. DeGrand, 15 Mass. 35, 39, 'is of universal operation, that one shall not by and of a court of justice, obtain the fruits of an unlawful bargain'." *Gibbs v. Consolidated Gas Co.*, 130 U.S. 396, 419, 32 L. Ed. 979, 9 S. Ct. 553.

"When the performance of a contract otherwise legal will involve the violation of the terms of a statute or of positive rule of law, it is not enforcible and cannot be ratified nor its terms made binding by ratification, waiver, or otherwise. Rue v. Missouri Pac. Ry. Co., 8 S.W. 533, 74 Tex. 474, 15 Am. St. Rep. 852; Raymond Rice C. & M. Co. v. Erp, 146 S.W. 155, 105 Tex. 161; Chimene v. Pennington, 79 S.W. 63, 34 Tex. Civ. App. 424." *Ferguson v. Mounts*, 281 S.W. 616, 621.

The Memorandum of Stipulations, including amendment, is void, not voidable. It therefore never had any existence and does not now exist. Likewise, anything, in-

cluding the creation of the Canadian, the Colorado, and other corporations, and many other contracts is also void for the reasons just stated in the cases cited.

## THE RULE THAT A MOTION TO DISMISS CONCEDED THE TRUTH OF ALL WELL PLEADED FACTS HAS A CONSTITUTIONAL BASIS.

There is an unquestionable reason why the rule "A motion to dismiss or quash a service of summons or complaint conceded the truth of all well pleaded facts." Particularly that rule protects the plaintiffs from defendants jumping the gun in cases like the one at bar in which plaintiffs' evidence is to be found only in the defendant corporations' minutes of stockholders' and directors' meetings, the acts of the officials and directors and agents of the company, their correspondence, its books of account, including stock ownership, contracts, records of every nature which may be competent and relevant, etc. in this manner by making a motion immediately dismissing or quashing the service of a summons and a complaint and also in barring plaintiffs from securing evidence necessary to support the merits of this case, as defendants have done in this instance.

In the case at bar plaintiffs propounded a great many interrogatories compelling defendants to answer the questions submitted to them. See Transcript of Record, 223-247. This was to be followed by plaintiffs' motion for production of records, correspondence, etc. just enumerated after having read defendants' answer to said interrogatories. But immediately after the defendants were served with these interrogatories they made a motion to dismiss and strike them out, which motion the court granted carte blanche. Tr. R. 286-288. On page 288 is to

be found the copy of the order of the court to the effect that the defendants should not be required to answer the interrogatories directed to them.

Immediately thereafter defendants filed a motion to dismiss and quash plaintiffs' service of summons and complaint, which was granted by the court on March 14, 1949.

The procedure followed by defendants and the District Court and Court of Appeals resulted in denying plaintiffs the use of the Discovery Rules. This amounted to denying them the due process of law of the Fifth Amendment.

## CONCLUSIONS

1. Plaintiffs were denied their constitutional right to be heard before the Court could enter judgment dismissing their cause of action.

2. Plaintiffs were denied the due process of law of the Fifth Amendment by the District Court and the Court of Appeals when the latter refused to apply the universally accepted principle of law that "for the purpose of the motion, all well pleaded facts are true."

3. By virtue of the foregoing principle the District Court and the Court of Appeals were duty bound to have taken into consideration plaintiffs' complaint and to declare that it set out a prima facie case holding that Canadian, Colorado, Natural and Southwestern were mere departments and adjuncts of Standard and Cities Service, the latter two being plaintiffs' true lesseees and the true operators of the natural gas properties in Texas without a license in Texas for that purpose, thus proving that E.

C. Wagner was their agent and also that the orders of the District Court were final.

4. The Court of Appeals erroneously assumed, without any proof given by it or the appellees, that the appellees as tort feasors were jointly and not jointly and severally liable.

(a) When, with the constructive trust in favor of the plaintiffs impressed upon said natural gas, defendants unlawfully drained natural gas from underneath plaintiffs' land and transported the same into other states, sold it, and kept the proceeds from such sales.

(b) When defendants, as conspirators, violated the federal anti-trust law, as set out in detail in plaintiffs' complaint.

5. The issue in this appeal is purely jurisdictional and collateral and entirely separate from the merits of this case and in this Canadian has no issue whatsoever, assuming that it is a corporate entity, and therefore the orders are final.

6. The liability of the appellees is not joint but joint and several.

7. The Memorandum of Stipulations is void and not voidable and therefore never had any existence and has none now. Therefore, the legality of any contract growing out of the same or connected with it is also void and neither directors, stockholders nor courts have power to breathe life into that original void contract.

In this plaintiffs have no interest except that through this invalidity Standard and Cities Service are left as the only corporate entities and therefore those two are not

only plaintiffs' lessees and the owners and operators of the natural gas properties in Texas but they are also the only two actual defendants in this case at bar, making the judgment entered by the District Court final.

Petitioners charge that the five orders dismissing the plaintiffs' summons and complaint are final judgments and therefore pray that their application for writ of certiorari be granted with such other reliefs as they may be entitled to.

Respectfully submitted,

---

ARTHUR H. BARTELT,
Box 190, Austin, Texas,
*Attorney for Petitioner.*

FILE COPY

Office-Supreme Court, U. S.
FILED
MAY 13 1950
CHARLES ELMORE CROPLEY
CLERK

# Supreme Court of the United States

**OCTOBER, 1949, TERM**

**No. 752**

FLOYD W. DUNAWAY, ALLIE MERLE DUNAWAY, joined by her husband, FLOYD W. DUNAWAY, MATTIE V. DUNAWAY, a feme sole, JOHNNIE FAY DUNAWAY SMITH, joined by her husband, CLARENCE R. SMITH, JULIA DUNAWAY IRICK, joined by her husband, J. T. IRICK, NELLIE DUNAWAY GROGAN, joined by her husband, GEORGE B. GROGAN, MAMIE DUNAWAY CUNDIFF, joined by her husband, E. J. CUNDIFF, MARY FRANCES DUNAWAY IRWIN, joined by her husband, EARL R. IRWIN, RUBY DUNAWAY WRIGHT, a feme sole, *Petitioners*,

*v.*

STANDARD OIL COMPANY (New Jersey), CITIES SERVICE COMPANY, NATURAL GAS PIPELINE COMPANY OF AMERICA, COLORADO INTERSTATE GAS COMPANY, SOUTHWESTERN DEVELOPMENT COMPANY, *Respondents.*

## REPLY OF RESPONDENT, COLORADO INTERSTATE GAS COMPANY, TO PETITION FOR WRIT OF CERTIORARI

WM. A. DOUGHERTY,
JAMES LAWRENCE WHITE,
Room 3020,
30 Rockefeller Plaza,
New York 20, New York.
WM. Q. BOYCE,
P. O. Box 550,
Amarillo, Texas,
*Attorneys for Respondent.*

WARLICK LAW PRINTING CO., INC. — *Law Brief Printing* — Dallas — Harwood-9350

## INDEX


| | Page |
|---|---|
| Caption | 1 |
| Statement of the Matter Involved | 2 |
| Point | 2 |
| Statement of the Case | 2– 3 |
| Statutes and Rules Involved | 3– 4 |
| Argument | 4–13 |
| Conclusion | 13 |

Page

Arnold v. United States for Use of W. B. Guimarin & Company, 263 U. S. 427, 434, 44 S. Ct. 144, 147, 68 L. Ed. 371 ..... 8

Courson v. Parker, 39 W. Va. 521, 20 S. E. 583 ..... 12

Federal Rules of Civil Procedure:
Rule 54 ..... 4, 10
Rule 54(b) ..... 7

George T. Bishop, Inc. v. Jones, 17 La. App. 410 136 So. 101 ..... 11

Hohorst v. The Hamburg-American Packet Company, 148 U. S. 261, 263, 13 S. Ct. 590, 37 L. Ed. 443 ..... 7, 11

Hunteman v. New Orleans Public Service (C. C. A.-5-1941), 119 F. 2d 465, Cert. Den., 314 U. S. 647, 86 L. Ed. 519 ..... 8

Kaufman v. Catzen, 81 W. Va. 1, 94 S. E. 388, L. R. A. 1918B 672 ..... 12

Liverpool, Brazil and River Platte Navigation Co. v. Agar and LeLong (E. D. La.-1882), 14 F. 615 ..... 11

Lockhart v. New York Life Insurance Company (C. C. A.-4-1934), 71 F. 2d 684 ..... 12

Markham v. Kasper (C. C. A.-7-1945), 152 F. 2d 270 10

Photometric Products Corporation v. Radtke (C. C. A.-2-1946), 157 F. 2d 849 ..... 10

Roberts v. Toney, 100 W. Va. 688, 131 S. E. 552 ..... 12

Rusca and Cunningham v. Hammet, 195 So. 642, 643 11

Title 28, U. S. Code:
Section 1291 ..... 3, 7
Section 1292 ..... 3, 7

United States v. Braunstein (C. C. A.-2-1948), 168 F. 2d 749 ..... 10

Weimer v. Rector, 43 W. Va. 735, 28 S. E. 716 ..... 12

Western Contracting Corporation, et al. v. National Surety Corporation (C. C. A.-4-1947), 163 F. 2d 456 ..... 12

# Supreme Court of the United States

**OCTOBER, 1949, TERM**

---

**No. 752**

---

FLOYD W. DUNAWAY, ALLIE MERLE DUNAWAY, joined by her husband, FLOYD W. DUNAWAY, MATTIE V. DUNAWAY, a feme sole, JOHNNIE FAY DUNAWAY SMITH, joined by her husband, CLARENCE R. SMITH, JULIA DUNAWAY IRICK, joined by her husband, J. T. IRICK, NELLIE DUNAWAY GROGAN, joined by her husband, GEORGE B. GROGAN, MAMIE DUNAWAY CUNDIFF, joined by her husband, E. J. CUNDIFF, MARY FRANCES DUNAWAY IRWIN, joined by her husband, EARL R. IRWIN, RUBY DUNAWAY WRIGHT, a feme sole,

*Petitioners,*

*v.*

STANDARD OIL COMPANY (New Jersey), CITIES SERVICE COMPANY, NATURAL GAS PIPELINE COMPANY OF AMERICA, COLORADO INTERSTATE GAS COMPANY, SOUTHWESTERN DEVELOPMENT COMPANY,

*Respondents.*

---

## REPLY OF RESPONDENT, COLORADO INTERSTATE GAS COMPANY, TO PETITION FOR WRIT OF CERTIORARI

---

*To the Honorable Fred M. Vinson, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:*

The Respondent, Colorado Interstate Gas Company, for reply to the petition for writ of certiorari shows the following:

## STATEMENT OF MATTER INVOLVED

The question before the court is whether the United States Court of Appeals for the Fifth Circuit had jurisdiction to entertain an appeal from orders of the District Court quashing service of process on and dismissing five of six defendants who were alleged to be individually and jointly liable; the suit was left pending as to the sixth defendant. On motion of this respondent the appeal from the order quashing service of process upon it was dismissed. (R. 383.)

In support of the order of the Court of Appeals dismissing the appeal, this respondent urges the following point:

## POINT

**The appeal was properly dismissed because the orders of the District Court, from which the appeal was taken, adjudicated less than all of the claims, consequently under Rule 54(b) of the Federal Rules of Civil Procedure they did not adjudicate any of Petitioners' claims. The orders were not final decisions and were therefore not appealable under Sections 1291 and 1292, Title 28, of the United States Code.**

## STATEMENT OF THE CASE

Claiming violation of the Sherman and Clayton Acts, Petitioners brought suit in the United States District Court for the Northern District of Texas against six corporate defendants. The defendants were alleged to be individually and jointly liable to Petitioners in damages for breach of

an implied covenant of an oil and gas lease to protect against drainage. Service of process on Standard Oil Company (New Jersey), Cities Service Company, Natural Gas Pipeline Company of America, Colorado Interstate Gas Company, and Southwestern Development Company was quashed and those defendants were dismissed. The remaining defendant, Canadian River Gas Company, was admittedly properly served and the suit against it remains pending in the District Court.

## STATUTES AND RULES INVOLVED

### Title 28, U. S. Code

*Section 1291:*

> The Court of Appeals shall have jurisdiction of appeals from all Final Decisions of the district courts of the United States, the district court of the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, except where direct review may be had in the Supreme Court.

*Section 1292:*

> The Court of Appeals shall have jurisdiction over appeals from, (1) Interlocutory orders of the District Courts of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court for the Virgin Islands, or of the judges thereof, granting, continuing, modifying, reviewing or dissolving injunctions, except where direct review may be had in the Supreme Court; (2) Interlocutory orders appointing receiver or refusing orders to wind up receivership, or to take steps to accomplish the purpose thereof, such as directing sales or other disposals of property; and (3) Interlocutory decrees of such dis-

trict courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed; and (4) judgments in civil action for patent infringement which are final except for accounting.

**Federal Rules of Civil Procedure**

*Rule 54:*

(a) *Definition; Form.* "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment shall not contain a recital of pleadings, the report of a master, or the record of prior proceedings.

(b) *Judgment Upon Multiple Claims.* When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, the court may direct the entry of a final judgment upon one or more but less than all of the claims only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates less than all the claims shall not terminate the action as to any of the claims, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims.

## ARGUMENT

Petitioners' claim is grounded upon alleged drainage of natural gas from beneath their land in the Panhandle of Texas. The land is under oil and gas lease to Canadian River Gas Company; the petitioners sue for alleged damages for breach of an implied covenant of the oil and gas lease to protect against drainage. (Paragraphs III, IV, V

and VI of the Complaint, R. 5-9.) Canadian River Gas Company is a party to the suit. (R. 5.) Standard Oil Company (New Jersey), Cities Service Company, Natural Gas Pipeline Company of America, Colorado Interstate Gas Company and Southwestern Development Company were made parties on the theory that asserted contractual relations among them and Canadian River Company made such defendants the real parties at interest and constituted a violation of the Sherman and Clayton Acts. [Paragraph I, (R. 3), and Paragraphs VII to XVI, inclusive, (R. 10-32), of the Complaint.] Petitioners' contentions are summarized in the prayer of their Complaint as follows:

"WHEREFORE, plaintiffs demand judgment:

"(1) That defendant lessee or lessees, ever since plaintiffs' wells were brought in, have failed to protect all of plaintiffs' leases from drainage of gas in continuous substantial amounts and in fact lessee or lessees (defendants) themselves being the ones that have siphoned from underneath plaintiffs' leases gas in a total amount of 26,300,000 M. C. F.

"(2) That the Canadian River Gas Company and the Colorado Interstate Gas Company and Southwestern Development Company are alter egos, instrumentalties of Standard Oil of New Jersey.

"(3) That Standard Oil Company of New Jersey and Cities Service are and have always been plaintiffs' lessees.

"(4) That Natural Gas Pipeline Company of America and the Public Service Company of Colorado and Colorado-Wyoming Gas Company are alter egos and instrumentalities of Cities Service Company.

"(5) That the defendants, Standard Oil, Cities Service and Southwestern Development Company, on April 5, 1927, entered into an unlawful conspiracy to

monopolize the natural gas business in the ownership of a large natural gas reserve in the Panhandle district of Texas, to control its production, transportation and sale throughout the north central states, and to lessen competition, control prices and production in interstate commerce, all in violation of the anti-trust laws of the United States and of Texas and other states.

"(6) That the overt acts of the defendants in pursuance of their unlawful conspiracy resulted in financial damages to plaintiffs as herein before related in the sum of $920,000.00.

"(7) That judgment be awarded in favor of plaintiffs against each of the defendants, individually and jointly, for thrice the amount of such damages, and for court costs and reasonable attorney's fees." (R. 33.)

It thus appears that joint and several liability is being asserted against all six of the corporate defendants, including Canadian River Gas Company. Five of these defendants, Canadian River Gas Company being the only exception, made motions to quash the service of process. (R. 179-211.) These motions were sustained (R. 324-328) and from the orders sustaining them an appeal was taken. (R. 335-7.)

In their "Designation of Record" filed in the District Court the Respondents call attention to the fact that no appeal is being taken as to defendant, Canadian River Gas Company, which "has been and still is licensed to do business in Texas and admits that it has been duly served with process." (R. 349.)

From this statement of the record it is apparent: (1) that although more than one claim for relief is presented in the action, so far as the drainage feature of the case is concerned, there is but one cause of action; (2) that in its orders quashing the service the District Court did not direct the entry of a final judgment upon any of the claims; (3) that less than all of the claims having been adjudicated, the action is not terminated as to any of the claims and the orders are subject to revision at any time before the entry of judgment adjudicating all of the claims. *Rule 54(b), Federal Rules of Civil Procedure.* Under these circumstances the orders are not final decisions. Not being final decisions, they are not appealable under *Secs. 1291 and 1292 of Title 28 of the United States Code.*

One of the leading cases having to do with premature appeals is *Hohorst v. The Hamburg-American Packet Company, 148 U. S. 261, 263, 13 S. Ct. 590, 37 L. Ed. 443.* In that case several defendants were sued for patent infringement. The Packet Company demurred to the complaint on the ground that the causes of action against the several defendants were distinct and hence the bill of complaint was multifarious. The complainant was given leave to amend; this he did by inserting the word "jointly" in the allegations of the defendants' infringement and by alleging that the individual defendants were partners and agents and managers of the Packet Company's business, that the infringements were committed in the prosecution of the business and that all of the defendants coöperated and participated in the infringements. The Packet Com-

pany was then allowed to enter a special appearance in the nature of a motion to dismiss the complaint as to it because of lack of jurisdiction over its person. The motion was granted, the bill of complaint was dismissed as to the Packet Company and the complainant appealed. In dismissing the appeal the court says:

> "So far as appears from the record, the suit is still pending and undetermined as against the co-defendants of the company. We are of the opinion, therefore, that this appeal cannot be maintained because the decree rendered in favor of the company was not a final decree."

In the more recent case of *Arnold v. United States for Use of W. B. Guimarin & Company, 263 U. S. 427, 434, 44 S. Ct. 144, 147, 68 L. Ed. 371*, the court says:

> "It is well settled that a case may not be brought here by writ of error or appeal in fragments; that to be reviewable a judgment or decree must not only be final, but complete, that is, final not only as to all parties, but as to the whole subject-matter and as to all the causes of action involved; and that if the judgment or decree be not thus final and complete, the writ of error or appeal must be dismissed for want of jurisdiction."

The Fifth Circuit has followed the holding that an order, judgment, or decree dismissing one defendant and leaving for the future disposition of the court the same controversy as to others charged to be jointly liable with him is not appealable.

In *Hunteman v. New Orleans Public Service (C. C. A. 5-1941), 119 F. 2d 465, Cert. Den., 314 U. S. 647, 86 L. Ed. 519*, one alleged joint tort-feasor was dismissed on the

ground that the complaint failed to state a cause of action as against it. The plaintiff appealed from the order of dismissal and was met in the Court of Appeals with a motion to dismiss on the ground that the judgment appealed from was not a final judgment. In granting the motion the court said:

> "The question thus posed, whether this court has jurisdiction to entertain the appeal, must be answered in the negative upon the authority of Menge v. Warriner, 5 Cir., 120 F. 816, General Electric Co. v. Allis-Chalmers Co., 3 Cir., 194 F. 413, and Hohorst v. Hamburg-American Packet Co., 148 U. S. 262, 13 S. Ct. 590, 37 L. Ed. 443. An order, judgment, or decree dismissing one defendant and leaving for the future disposition of the court, the same controversy as to others who are charged to be jointly liable with him, is not a final decision which will support an appeal to this court under Section 128 of the Judicial Code, as amended. 28 U. S. C. A. Sec. 225, 43 Stat. 936. When a final decree is rendered which determines the rights of all the parties to the controversy, and which, upon affirmance would leave nothing to be done by the court below except to execute the decree, then, and not before, may an appeal properly be taken.
>
> "These principles do not conflict with the letter or spirit of the Federal Rules of Civil Procedure. The Rules are not intended to affect the jurisdiction of the district courts with whose procedure they deal; they do not affect the jurisdiction of the appellate courts to which they are not directed. By seeking a judgment in solido against several defendants charged to be jointly and concurrently negligent, we think appellant presented but one claim for determination between the parties. When a judgment is entered which puts an end to that controversy between all of the parties litigant, appellate jurisdiction may be invoked."

Although the case was decided prior to the amendment of Rule 54(b) giving it its present form, the Advisory Committee's Report contained in the note to the amended rule as it appears in *5 F. R. D. 472* indicates that it was the intention of the Committee to reinstate the rule followed in the *Hunteman Case.* In its report the Committee says:

> "After extended consideration, it (was) concluded that a retention of the older federal rule was desirable, and that this rule needed only the exercise of a discretionary power to afford a remedy in the infrequent harsh case to provide a simple, definite, workable rule. This is afforded by amended Rule 54(b). It reëstablishes an ancient policy with clarity and precision."

In the note the Committee cites the case of *Markham v. Kasper (C. C. A.-7-1945), 152 F. 2d 270.* The *Markham Case* cites the *Hunteman Case* and is directly in point on the effect of quashing service. In that case it is said:

> "The order of January 5, 1945, is also not appealable. It merely quashed service of summons as to one defendant, but left the rights of the other parties unaffected. It has been held that the dismissal of one defendant from a proceeding, leaving the same controversy as to others jointly charged with him for future disposition by the Court, is not an appealable order. Hunteman v. New Orleans Public Service, et al., 5 Cir. 119 F. 2d 465, and cases there cited. We think the same is true of the quashing of summons as to one."

Later cases citing the *Hunteman Case* are *Photometric Products Corporation v. Radtke (C. C. A.-2-1946), 157 F. 2d 849* and *United States v. Braunstein (C. C. A.-2-1948), 168 F. 2d 749.*

Under the authorities cited, the Court of Appeals correctly held the order quashing the service of process as to the appellee, Colorado Interstate Gas Company, was not one from which an appeal could be taken. But Petitioners contend that these authorities and those cited by the Court of Appeals are not applicable.

Petitioners make the point that neither the *Hunteman Case* nor the others cited by the Court of Appeals involved claims of joint and several liability but were restricted to claims of joint liability only. In this Petitioners are mistaken. Suit in the *Hunteman Case* was against three defendants, the plaintiffs' petition "alleging that the injury resulted from their (the defendants) joint and concurrent negligence, and asking judgment in solido against them." Petitioners have failed to take into consideration the meaning of the term "*in solido*". It is a term from the civil law and is synonymous with "joint and several". *Rusca and Cunningham v. Hammet, 195 So. 642, 643; George T. Bishop, Inc. v. Jones, 17 La. App. 136 So. 101; Liverpool, Brazil and River Platte Navigation Co. v. Agar and Le-Long (E. D. La.-1882), 14 F. 615.*

There is another reason why Petitioners' assertion that the *Hunteman Case* did not involve joint and several liability is mistaken. Under the Louisiana law contributing tort feasors are jointly and severally liable for the damages caused by their concurrent wrongful acts. *Roppolo v. Pick, 4 So. 2d 839.*

In *Hohorst v. The Hamburg American Packet Company, 148 U. S. 261, 13 Sup. Ct. 590, 37 L. Ed. 443*, the basic au-

thority relied upon by the Court of Appeals in the *Hunteman Case*, the complainant was asserting joint and several liability against the defendants. Complainant first sued the defendants severally, then amended the complaint by adding a claim of joint liability.

In *Western Contracting Corporation, et al. v. National Surety Corporation (C. C. A.-4-1947), 163 F. 2d 456*, cited by the Court of Appeals, a subcontractor brought an action against the general contractors, a joint venture, to recover damages for breach of contract. The contract was performable in West Virginia and the suit was instituted in the United States District Court for the Northern District of that State. In West Virginia the rights, obligations and duties of joint venturers are similar to those obtaining among partners. *Kaufman v. Catzen, 81 W. Va. 1, 94 S. E. 388, L. R. A. 1918 B 672.* And under the law of that state the liability of partners upon contractual obligations is joint and several. *Roberts v. Toney, 100 W. Va. 688, 131 S. E. 552; Weimer v. Rector, 43 W. Va. 735, 28 S. E. 716; Courson v. Parker, 39 W. Va. 521, 20 S. E. 583.* So we have another case in which the liability asserted was joint and several and not merely joint.

In *Lockhart v. New York Life Insurance Company (C. C. A.-4-1934), 71 F. 2d 68*, also cited by the Court of Appeals, a cause of action was alleged against the insurance company on policies of insurance; in addition, there were allegations of fact with reference to the conduct of a local agent named Dickinson and an averment that he as well as the company was indebted to plaintiff on the policies. Clearly joint and several liability was there asserted.

It is submitted that Petitioners have failed to show the commission of any error by the Court of Appeals.

## CONCLUSION

This Respondent urges that the petition for writ of certiorari be denied.

Respectfully submitted,

WM. A. DOUGHERTY,

JAMES LAWRENCE WHITE,
Room 3020,
30 Rockefeller Plaza,
New York 20, New York.

.....

WM. Q. BOYCE,
P. O. Box 550,
Amarillo, Texas,
*Attorneys for Respondent, Colorado Interstate Gas Company.*

I, WM. Q. BOYCE, attorney for the Respondent, Colorado Interstate Gas Company, do certify that a copy of the foregoing brief was mailed to Arthur H. Bartelt, P. O. Box 190, Austin, Texas, attorney for Petitioners, in a properly stamped and addressed envelope, this the ..... day of May, 1950.

.....

FILE COPY

FILED
MAY 13 1950
CHARLES ELMORE CROPLEY
CLERK

# Supreme Court of the United States

**OCTOBER, 1949, TERM**

---

**No. 752**

---

FLOYD W. DUNAWAY, ALLIE MERLE DUNAWAY, joined by her husband, FLOYD W. DUNAWAY, MATTIE V. DUNAWAY, a feme sole, JOHNNIE FAY DUNAWAY SMITH, joined by her husband, CLARENCE R. SMITH, JULIA DUNAWAY IRICK, joined by her husband, J. T. IRICK, NELLIE DUNAWAY GROGAN, joined by her husband, GEORGE B. GROGAN, MAMIE DUNAWAY CUNDIFF, joined by her husband, E. J. CUNDIFF, MARY FRANCES DUNAWAY IRWIN, joined by her husband, EARL R. IRWIN, RUBY DUNAWAY WRIGHT, a feme sole, *Petitioners,*

*v.*

STANDARD OIL COMPANY (New Jersey), CITIES SERVICE COMPANY, NATURAL GAS PIPELINE COMPANY OF AMERICA, COLORADO INTERSTATE GAS COMPANY, SOUTHWESTERN DEVELOPMENT COMPANY, *Respondents.*

---

## REPLY OF RESPONDENT SOUTHWESTERN DEVELOPMENT COMPANY TO PETITION FOR WRIT OF CERTIORARI

---

PAUL A. McDERMOTT,
Fort Worth, Texas.

WALES H. MADDEN,
Amarillo, Texas,
*Attorneys for Respondent.*

ADKINS, MADDEN, FOLLEY & ADKINS,
*Of Counsel.*

WARLICK LAW PRINTING CO., INC. — *Law Brief Printing* — Dallas — Harwood-9350

## SUBJECT INDEX


| | Page |
|---|---|
| Statement of the Case | 2– 3 |
| Argument of Respondent | 3–12 |
| Summary of the Argument | 3– 4 |
| Point 1: The Petition for Writ of Certiorari Does Not Comply with Section 2 of Rule 38 of the Supreme Court | 4– 5 |
| Point 2: The Petition Fails to Disclose Any Special and Important Reason for Granting the Writ | 5 |
| Point 3: The Orders Appealed from Were Not Final Orders and Not Appealable Under Sections 1291 and 1292 of Title 28 of the United States Code | 5–12 |
| Conclusion | 12 |

Page

Arnold v. United States of America for the use of W. V. Guimarin & Co., 263 U. S. 427 ..... 8, 9, 10, 11
Barber Asphalt Paving Co. v. Standard Asphalt & Rubber Co., 275 U. S. 372 ..... 4
Cole v. Rustgard, 68 F. 2d 316 ..... 8
Furness, Withy & Co. v. Yang-Ztsze Ins. Assn., 242 U. S. 430 ..... 4
General Talking Pictures Corp. v. Western Electric Co., 304 U. S. 175 ..... 5
George T. Bishop Inc. v. Jones, 17 La. App. 410, 136 So. 101 ..... 11
Henderson v. Wadsworth, 115 U. S. 264 ..... 11
Hohorst v. Hamburg-American Packet Co., 148 U. S. 262 ..... 8, 9, 10, 11
Hunteman v. New Orleans Pub. Serv. Inc., et al., 119 F. 2d 465, cert. den. 314 U. S. 647 ..... 9, 11
Layne & Bowler Corp. v. Western Well Works, 261 U. S. 387 ..... 4
Mollie Tiger and Cumsey v. F. S. Lozier, 275 U. S. 496 ..... 5
Rusca & Cunningham v. Hammett (La. App.), 195 So. 642 ..... 11
Southern Power Co. v. North Carolina Public Service Co., 263 U. S. 508 ..... 4, 5
U. S. v. Rimer, 220 U. S. 547 ..... 5
Warren E. Brown v. Louis H. Kreitmeyer, 275 U. S. 496 ..... 5

## Table of Statutes Cited

Sec. 225, Title 28, United States Code ..... 11
Sec. 1291, Title 28, United States Code ..... 4, 5, 11, 12
Sec. 1292, Title 28, United States Code ..... 4, 5, 11, 12

## Table of Supreme Court Rules Cited

Sec. 2, Rule 38, Supreme Court Rules ..... 3
Sec. 5, Rule 38, Supreme Court Rules ..... 5

# Supreme Court of the United States
**OCTOBER, 1949, TERM**

---

**No. 752**

---

FLOYD W. DUNAWAY, ALLIE MERLE DUNAWAY, joined by her husband, FLOYD W. DUNAWAY, MATTIE V. DUNAWAY, a feme sole, JOHNNIE FAY DUNAWAY SMITH, joined by her husband, CLARENCE R. SMITH, JULIA DUNAWAY IRICK, joined by her husband, J. T. IRICK, NELLIE DUNAWAY GROGAN, joined by her husband, GEORGE B. GROGAN, MAMIE DUNAWAY CUNDIFF, joined by her husband, E. J. CUNDIFF, MARY FRANCES DUNAWAY IRWIN, joined by her husband, EARL R. IRWIN, RUBY DUNAWAY WRIGHT, a feme sole, *Petitioners*,

*v.*

STANDARD OIL COMPANY (New Jersey), CITIES SERVICE COMPANY, NATURAL GAS PIPELINE COMPANY OF AMERICA, COLORADO INTERSTATE GAS COMPANY, SOUTHWESTERN DEVELOPMENT COMPANY, *Respondents.*

---

## REPLY OF RESPONDENT SOUTHWESTERN DEVELOPMENT COMPANY TO PETITION FOR WRIT OF CERTIORARI

---

*To the Honorable Fred M. Vinson, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:*

The Respondent Southwestern Development Company, for reply to the petition for writ of certiorari, shows the following:

## I.

## STATEMENT OF THE CASE

This is an action brought by petitioners in the United States District Court for the Northern District of Texas against this respondent and five other foreign corporations, namely, Standard Oil Company (New Jersey), Cities Service Company, Natural Gas Pipeline Company of America, Canadian River Gas Company, and Colorado Interstate Gas Company, of which only Canadian River Gas Company has a permit to do business in the State of Texas. Joint and several liability was alleged as against all six of the defendants for claimed breach of an implied covenant of an oil and gas lease to protect against drainage resulting from conspiracy under the Sherman and Clayton Acts, which drainage was alleged to have damaged petitioners in the sum of $920,000.00, and petitioners prayed judgment for thrice the amount of such damages and for court costs and reasonable attorneys' fees. (R. 33-34.)

Each of the defendants except Canadian River Gas Company filed a motion to quash the service, and each except Standard Oil Company (New Jersey) moved to dismiss the action for want of jurisdiction and venue. (R. 381.) Each of the motions to quash was sustained, the cause was dismissed as to each of the moving defendants (R. 381), and plaintiffs appealed from each of the orders. (R. 335-336.)

Respondent Southwestern Development Company filed its motion in the United States Court of Appeals for the

Fifth Circuit to dismiss the appeal on the ground that the order appealed from was not a final judgment. Thereafter, and on December 19, 1949, the United States Court of Appeals for the Fifth Circuit made and entered its judgment sustaining respondent's motion, and dismissed the appeal. (R. 381-383.) And petitioners are making this application for writ of certiorari to review this judgment.

## II.

## ARGUMENT

### Summary of the Argument

The petition for writ of certiorari should be denied because:

1. The petition fails to comply with Section 2 of Rule 38 of the Supreme Court, in that the petition does not contain a summary and short statement of the matter involved, a statement particularly disclosing the basis upon which it is contended that this Court has jurisdiction to review the judgment or decree in question, nor a statement of the considerations presented and the reasons relied on for the allowance of the writ;

2. The petition fails to disclose any special and important reasons for granting the writ; and

3. The appeal was properly dismissed because the orders of the United States District Court for the Northern District of Texas, from which the appeal was taken, were not final orders and therefore were not appealable under

Sections 1291 and 1292 of Title 28 of the United States Code.

**Point 1**

The petition for writ of certiorari should be denied because it fails to comply with Section 2 of Rule 38 of the Supreme Court, in that the petition does not contain a summary and short statement of the matter involved, a statement particularly disclosing the basis upon which it is contended that this Court has jurisdiction to review the judgment in question, nor a statement of the considerations presented and the reasons relied on for the allowance of the writ.

The first part of Section 2 of Rule 38 of the Supreme Court provides that the petition shall contain a summary and short statement of the matter involved, a statement particularly disclosing the basis upon which it is contended that this Court has jurisdiction to review the judgment in question and the reasons relied on for the allowance of the writ; and that a failure to comply with these requirements will be a sufficient reason for denying the petition. We submit that the petition for the writ (pages 2-33 of the petition) wholly fails to meet these requirements, and that a most casual reading of the petition evidences this fact. Accordingly, and for this reason, the petition for the writ should be denied.

*Furness, Withy & Co. v. Yang-Ztsze Ins. Assn., 242 U. S. 430; Layne & Bowler Corp. v. Western Well Works, 261 U. S. 387; Southern Power Co. v. North Carolina Pub. Serv. Co., 263 U. S. 508; Barber Asphalt Paving Co. v.*

*Standard Asphalt & Rubber Co., 275 U. S. 372; Mollie Tiger and Cumsey v. F. S. Lozier, 275 U. S. 496; Warren E. Brown v. Louis H. Krietmeyer, 275 U. S. 496.*

**Point 2**

The petition for writ of certiorari should be denied because the petition fails to disclose any special and important reason for granting the writ.

Section 5 of Rule 38 of the Supreme Court provides that a review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. Nowhere in the petition for the writ does there appear any special or important reason why this Court should review the judgment of the Court of Appeals for the Fifth Circuit. Accordingly, the petition for writ of certiorari should be denied. *U. S. v. Rimer, 220 U. S. 547; Southern Power Co. v. North Carolina Pub. Serv. Co., 263 U. S. 508,* and *General Talking Pictures Corp. v. Western Electric Co., 304 U. S. 175.*

**Point 3**

The petition for writ of certiorari should be denied for the reason that the appeal was properly dismissed because the orders of the United States District Court for the Northern District of Texas, from which the appeal was taken, were not final orders and therefore were not appealable under Sections 1291 and 1292 of Title 28 of the United States Code.

Petitioners sued for damages for breach of an implied covenant of an oil and gas lease to protect against drainage. (Paragraphs III, IV, V and VI of the Complaint, R. 5-9.) This lease was executed by the petitioners to Canadian River Gas Company, which company is a party to the suit. (R. 5.) Standard Oil Company (New Jersey), Cities Service Company, Natural Gas Pipeline Company of America, Colorado Interstate Gas Company and Southwestern Development Company were made parties on the theory that certain alleged contractual relationships between them and Canadian River Gas Company made them the real parties at interest and constituted a violation of the Sherman and Clayton Acts. (Paragraph I, R. 3; pars. VII-XVI inclusive, R. 10-32, of the Complaint.) Petitioners' contentions are summarized in the prayer of their complaint as follows:

"WHEREFORE, plaintiffs demand judgment:

"(1) That defendant lessee or lessees, ever since plaintiffs' wells were brought in, have failed to protect all of plaintiffs' leases from drainage of gas in continuous substantial amounts and in fact lessee or lessees (defendants) themselves being the ones that have siphoned from underneath plaintiffs' leases gas in a total amount of 26,300,000 M. C. F.

"(2) That the Canadian River Gas Company and the Colorado Interstate Gas Company and Southwestern Development Company are alter egos, instrumentalities of Standard Oil of New Jersey.

"(3) That Standard Oil Company of New Jersey and Cities Service are and have always been plaintiffs' lessees.

"(4) That Natural Gas Pipeline Company of America and the Public Service Company of Colorado

and Colorado-Wyoming Gas Company are alter egos and instrumentalities of Cities Service Company.

"(5) That the defendants, Standard Oil, Cities Service and Southwestern Development Company on April 5, 1927, entered into an unlawful conspiracy to monopolize the natural gas business in the ownership of a large natural gas reserve in the Panhandle district of Texas, to control its production, transportation and sale throughout the north central states, and to lessen competition, control prices and production in interstate commerce, all in violation of the anti-trust laws of the United States and of Texas and other states.

"(6) That the overt acts of the defendants in pursuance of their unlawful conspiracy resulted in financial damages to plaintiffs as herein before related in the sum of $920,000.00.

"(7) That judgment be awarded in favor of plaintiffs against each of the defendants, individually and jointly, for thrice the amount of such damages, and for court costs and reasonable attorney's fees." (R. pp. 33-34.)

Thus it appears that petitioners assert joint and several liability against all six of the corporate defendants, including Canadian River Gas Company. Upon proper motions, orders were entered quashing the service of process or dismissing all the defendants except Canadian River Gas Company. (R. 324-329.)

No appeal was taken by Canadian River Gas Company, which admits that it has been duly served with process and has been and still is licensed to do business in Texas.

From the above, we see that there is but one cause of action alleged, that being drainage resulting from the alleged conspiracy in violation of the Sherman and Clayton

Acts; and the alleged cause of action against several defendants jointly and severally liable not having been determined as to all of them, the orders dismissing as to part of them are not appealable under Sections 1291 and 1292 of Title 28 of the United States Code.

In this connection the courts have held in *Cole v. Rustgard, 68 F. 2d 316*, and *Shultz v. Manufacturers & Traders Trust Co., 103 F. 2d 771*, that except as otherwise provided by statute, the case may not be brought up on appeal in fragments, but judgments appealed from must be final and complete as to subject matter and as to parties.

Two of the leading cases which have been decided by this Court having to do with appeals from orders that are not final are *Hohorst v. Hamburg-American Packet Co., 148 U. S. 262*, and *Arnold v. United States of America for the use of W. V. Guimarin & Co., 263 U. S. 427*. The *Hohorst case* involved an action for joint and several liability resulting from patent infringement. A motion to dismiss the Hamburg Company for lack of jurisdiction over its person was sustained and the complaint was dismissed as to it, from which the complainant appealed. The Court, in dismissing the appeal, said:

> "So far as appears from the record the suit is still pending and undetermined as against the codefendants of the company. We are of the opinion, therefore, that this appeal can not be maintained because the decree rendered in favor of the company was not a final decree."

The *Arnold case* involves an action by a subcontractor on a contractor's bond under the Materialmen's Act. Recovery

was allowed by the courts as to this subcontractor, but the case was remanded for the bond money to be held by a master until other interested subcontractors could enter any claims which they might have against the surety money. Although liability was final as to the claim of the complaining subcontractor, this Honorable Court, in refusing an appeal, said:

> "It is well settled that a case may not be brought here by writ of error or appeal in fragments; that to be reviewable, a judgment or decree must be not only final, but complete; that is, final not only as to all the parties, but as to the whole subject matter and as to all the causes of action involved; and that if the judgment or decree be not thus final and complete, the writ of error or appeal must be dismissed for want of jurisdiction."

Our Fifth Circuit followed the Supreme Court's holdings in the *Hohorst* and *Arnold cases* in its holding in *Hunteman v. New Orleans Pub. Serv. Inc., et al., 119 F. 2d 465, cert. den., 314 U. S. 647.* This was an action against joint tort feasors which alleged joint and concurrent negligence and asked for a judgment in solido against them. The action was dismissed as to one of them on the ground that the company failed to state a claim upon which relief could be granted, and the Fifth Circuit dismissed the appeal, holding that there was but one claim for determination between the parties, and as this claim was still pending as to some of them, there was no final judgment from which an appeal would lie.

Let us consider the case at bar in the light of the above authorities. This is an action against several defendants,

jointly and severally, for alleged conspiracy in violation of the Sherman and Clayton Acts. The orders of March 14, 1949 (R. 328-329), quashed the service and dismissed the action as to Respondent Southwestern Development Company and other respondents, leaving petitioners' alleged cause of action still pending against Defendant Canadian River Gas Company in the United States District Court for the Northern District of Texas. Thus we have plaintiffs suing jointly and severally six defendants, and orders of the court dismissing some of the defendants but not all of them. Applying the *Arnold* and *Hohorst cases* to our facts, we have but one claim for determination between the parties: the original case has only been split, and the United States District Court for the Northern District of Texas has jurisdiction as to a part of it; so there is not a final judgment which is appealable.

Petitioners, in their brief in support of their petition for writ of certiorari (pp. 54-64), find no fault with this Honorable Court's holdings in the *Arnold* and *Hohorst cases*, nor with the holding of the Court of Appeals for the Fifth Circuit in the *Hunteman case*, but say they are not applicable here, as this is an action for joint and several liability, whereas the *Hohorst*, *Arnold* and *Hunteman cases* were for joint liability only. In this, petitioners are in error, as the *Hohorst case* was an action for joint and several liability based on patent infringement; the *Arnold case* was for joint and several liability against a contractor and his surety; and the *Hunteman case* was for joint and several liability against joint tort feasors in which a judgment *in solido* against all of the tort feasors

was sought. Apparently petitioners failed to take into account the meaning of the term, "in solido". "In solido" is a term taken from the civil law, and is synonymous with "joint and several". *Henderson v. Wadsworth, 115 U. S. 264; George T. Bishop, Inc. v. Jones, 17 La. App. 410, 136 So. 101; Rusca & Cunningham v. Hammett (La. App.), 195 So. 642.*

Although petitioners failed to realize the significance of the term, "in solido", the United States Court of Appeals for the Fifth Circuit did realize such significance when it entered its judgment in this action dismissing the appeal, in which it said:

> "It is further ordered and adjudged that the appellants, Floyd W. Dunaway, and others, and the surety on the appeal bond herein, American Surety Company of New York, be condemned, *in solido* (emphasis ours), to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court." (R. 383.)

Thus it is seen that the *Hohorst, Arnold* and *Hunteman cases* apply to joint and several liability, and not merely joint liability as contended by petitioners. It is a fact that the *Hunteman case* was decided under Section 225 of Title 28 of the United States Code, and that this section has been amended by Sections 1291-1294 of Title 28; but this amendment did not change the meaning of said Section 225 or the jurisdiction conferred upon the courts of appeal as to appealable orders.

Under the authorities cited, it is submitted that the order dismissing the action as to Respondent Southwestern De-

velopment Company is not one from which an appeal may be taken under Sections 1291 and 1292 of Title 28 of the United States Code, and the United States Court of Appeals for the Fifth Circuit was correct in dismissing petitioners' appeal.

## CONCLUSION

It is therefore respectfully submitted that this case is not a proper one for review by certiorari, and that the petition for a writ of certiorari should be denied.

Respectfully submitted,

Wales H. Madd

WALES H. MADDEN,
903 Fisk Building,
Amarillo, Texas.

PAUL A. MCDERMOTT,
Fair Building,
Fort Worth, Texas,
*Attorneys for Respondent, Southwestern Development Company.*

I, Wales H. Madden, attorney for the Respondent Southwestern Development Company, do certify that a copy of the foregoing reply was mailed to Arthur H. Bartelt, Post Office Box 190, Austin, Texas, attorney for petitioners, in a properly stamped and addressed envelope this the 11 day of May, 1950.

Wales H. Madden